Supreme Court, U.S.
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No. 09-_____

IN THE

Supreme Court of the United States

LORILLARD TOBACCO COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA, *ET AL.*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether a group of corporations can constitute an association-in-fact enterprise under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68.

(2) Whether the court of appeals contravened the First Amendment and *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), by failing to undertake independent appellate review of the factual findings of a district court that has found that speech is not constitutionally protected because it is fraudulent.

(3) Whether a court may deem speech to be fraudulent where: (a) the speech addressed important public controversies and potential regulation; (b) the speech expressed opinions regarding ongoing scientific disputes or statements that were undisputedly true under at least one reasonable interpretation; (c) there was no allegation or finding that any individual associated with Petitioner possessed specific intent to defraud; or (d) there was no evidence or finding that the speech was material to a reasonable consumer.

(4) Whether the court of appeals erred by denying First Amendment protection to use of the terms "light" and "low-tar," where statements using those terms accurately summarize tar and nicotine levels as measured by the method approved by the Federal Trade Commission.

(5) Whether the court of appeals erred in affirming an injunction that merely tracks broad statutory commands, compels speech in the form of

"corrective statements," and is not predicated on a reasonable likelihood of future RICO violations.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioner in this case is Lorillard Tobacco Company. Lorillard Tobacco Company is a wholly-owned subsidiary of Lorillard, Inc. Lorillard, Inc. is the only publicly held company that owns 10% or more of Lorillard Tobacco Company's stock.

The Respondents are the United States of America, and Intervenors below: Tobacco-Free Kids Action Fund; American Cancer Society; American Heart Association; American Lung Association; Americans for Nonsmokers' Rights; and National African American Tobacco Prevention Network.

In addition to Petitioner, Defendants-Appellants-Cross-Appellees below were Philip Morris USA Inc.; Altria Group, Inc.; R.J. Reynolds Tobacco Company; Brown & Williamson Holdings, Inc.; British American Tobacco (Investments) Ltd.; The Council for Tobacco-Research-U.S.A., Inc.; The Tobacco Institute, Inc.; and Liggett Group, Inc.

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PETITION FOR A WRIT OF CERTIORARI

This Petition presents the Court with an opportunity to rein in a federal statute, the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"), that has become virtually limitless in its application. This case starkly illustrates the absence of manageable boundaries on RICO's scope. The United States, relying on lower court decisions that have refused to recognize limitations on an association-in-fact "enterprise" as defined in 18 U.S.C. § 1961(4), has challenged the conduct of an entire industry over many decades, and has sought remedies that threaten its continued existence.

Under the government's theory, an association-in-fact enterprise, notwithstanding its statutory definition as "any union or group of *individuals* associated in fact although not a legal entity," may consist of a group of *corporations*. A review of the statutory language, structure, and purpose makes clear that a group of corporations cannot form an association-in-fact enterprise. Several members of this Court have expressed skepticism about the contrary position adopted by the lower courts. *See* Transcript of Oral Argument, *Mohawk Indus., Inc. v. Williams*, No. 05-465 (Apr. 26, 2006) ("*Mohawk* Tr."), at 28-54. This case—which the United States has described as the most important civil RICO case in history, *see* Petition for Writ of Certiorari, *United States v. Philip Morris USA Inc.*, No. 05-92 ("05-92 U.S. Pet."), at 8 (2005)—provides an excellent vehicle for the Court to address squarely the scope of Section 1961(4)'s definition of

enterprise, which the lower courts have misconstrued to give RICO an effectively unlimited reach.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 566 F.3d 1095. The decision of the district court (Pet. App. 101a) is reported at 449 F. Supp. 2d 1.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 2009. Pet. App. 1a. Petitions for rehearing were denied on September 22, 2009. *Id.* at 2182a-2185a. On November 10, 2009, the Chief Justice extended the time within which to file a petition for a writ of certiorari until February 19, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides:

> Congress shall make no law . . . abridging the freedom of speech . . . .

Section 1961(4) of Title 18, United States Code, provides:

> **§ 1961. Definitions**
>
> As used in this chapter—
>
> (4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact, although not a legal entity.

Other relevant provisions of the RICO statute, 18 U.S.C. §§ 1961-18, are reproduced in the Statutory Appendix.

STATEMENT

1. In September 1999, the government brought suit against Lorillard and the rest of the U.S. tobacco industry. The complaint sought disgorgement of profits and injunctive and declaratory relief under RICO and other statutes.[1] In February 2001, the government filed an amended complaint against the same group of defendants.

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[1] The government also asserted claims under the Medical Care Recovery Act, 42 U.S.C. §§ 2651, *et seq.*, and the Medicare Secondary Payer provisions of Subchapter 18 of the Social Security Act, 42 U.S.C. § 1395y(b)(2)(B)(ii) & (iii). The district court dismissed those claims. *See United States v. Philip Morris Inc.*, 116 F. Supp. 2d 131 (D.D.C. 2000). The government did not appeal that ruling.

RICO makes it unlawful for "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity" or to conspire to do so. 18 U.S.C. §§ 1962(c), (d). A RICO enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or *group of individuals associated in fact* although not a legal entity." *Id.* § 1961(4) (emphasis added). RICO authorizes district courts "to prevent and restrain violations of [RICO] by issuing appropriate orders" for equitable relief. *Id.* § 1964(a).

The government's complaint alleged that defendants and "others known and unknown" constituted an association-in-fact enterprise under Section 1961(4). First Am. Compl. ¶ 204. It further alleged that, beginning no later than 1953 and continuing for more than 45 years, defendants violated RICO by conducting the affairs of that enterprise through a pattern of racketeering activity. *Id.* According to the government, this pattern of racketeering involved over 100 mailings and wirings that violated the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343. *Id.*[2]

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[2] Many of the alleged predicate acts were acts or statements that were not directed to consumers, Pet. App. 2124a-2180a, and nearly all of the public statements identified by the government were made by defendants to oppose government (continued...)

The government sought sweeping injunctive relief involving virtually every aspect of defendants' lawful businesses. Even though Section 1964(a) limits district court jurisdiction to remedies calculated to "prevent and restrain" *future* RICO violations, the government's allegations focused overwhelmingly on conduct that occurred decades ago–much of which concerned people who are no longer employed by the companies (or even alive), trade organizations that no longer exist, and scientific issues that defendants have not disputed for years. *Id.* ¶¶ 1–6.[3]

The government requested a generic injunction barring defendants from committing any "acts of racketeering" and "making false, misleading or deceptive statements or representations concerning cigarettes." *Id.* at pp. 92–93. The government also sought an injunction compelling defendants to make "corrective statements regarding the health risks of cigarette smoking and the

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regulation or as part of the unfolding scientific and public health debate regarding smoking and disease, *id.* at 373a-1801a, 1893a-1921a.

[3] The government also sought a monetary recovery of $280 *billion* as an equitable "disgorgement" of defendants' "profits." On interlocutory appeal, the D.C. Circuit held that § 1964(a) does not authorize this remedy because disgorgement is aimed at *past* misconduct, not at preventing and restraining *future* RICO violations. *United States v. Philip Morris USA Inc.*, 396 F.3d 1190, 1198 (D.C. Cir. 2005). This Court denied the government's petition for a writ of certiorari from that decision. *United States v. Philip Morris USA Inc.*, 546 U.S. 960 (2005).

addictive properties of nicotine." *Id.* The government further sought appointment of a court-approved monitor to oversee defendants' business activities and their compliance with these injunctions. *Id.*

2. After five years of discovery and pre-trial proceedings, the case went to trial in September 2004. The bench trial lasted nine months and included live testimony from more than 80 witnesses, written testimony from more than 150 witnesses, and more than 14,000 exhibits.

The government alleged that defendants made false statements or denials relating to (1) the health risks of smoking and exposure to environmental tobacco smoke, (2) sponsoring independent research into the health effects of smoking, (3) addiction, (4) nicotine manipulation, (5) youth marketing, and (6) marketing of "light" and "low tar" cigarettes. *Id.* ¶¶ 3, 35-125. The government also alleged that defendants suppressed evidence and destroyed documents relating to these alleged schemes. *Id.*

In attempting to prove the alleged frauds, the government expressly asserted that it would not seek to prove that any individual corporate agent acted with specific intent. Instead, the government contended that the speaker's intent was "immaterial" because specific intent could be proved through defendants' "collective knowledge." Transcript of Proceedings at 39:4-12 (Sept. 21, 2004).

In August 2006, fifteen months after the trial ended, the district court issued a 1,653-page opinion

ruling that defendants had conspired to violate RICO and had in fact violated RICO. Pet. App. 94a. In the opinion's "Findings of Fact" section, the court stated that its use of the word "enterprise" "d[id] not imply that Defendants' activities meet the statutory definition [of 'enterprise'] contained in 18 U.S.C. § 1964(a)." *Id.* at 119a n.8. Yet in the "Conclusions of Law" section of the opinion, the court supported its holding on the "enterprise" requirement with generic "see generally" citations to its Findings of Fact. *Id.* at 1921a-1944a.

The district court variously described the enterprise either as being "comprised of a group of business entities and individuals associated-in-fact, including Defendants to this action," or "individual defendants working together" even though RICO's statutory language restricts association-in-fact enterprises to groups of "individuals," not corporations. *Id.* at 1921a, 1930a. The court further found that the enterprise "created and used formal and informal entities, many with overlapping participants and purposes to serve [its] central mission." *Id.* at 1926a. The court referred to the "organization of the Enterprise" as an "amoeba" that "changed its shape to fit current needs." *Id.* at 1925a-1926a.

Consistent with the amorphous nature of the enterprise that the district court found, and the government's theory before and at trial that it need not show that any agent or employee of any defendant acted with specific intent, the district court adopted the government's collective corporate intent standard and found that defendants acted

with the requisite intent based on the "collective knowledge" of the entire "Enterprise." *Id.* at 1972a, 1976a-1985a.

After finding defendants liable under RICO, the district court proceeded to impose remedies. The court ordered defendants to make "corrective communications" regarding "(1) the adverse health effects of smoking; (2) the addictiveness of smoking and nicotine; (3) the lack of any significant health benefit from smoking [low tar cigarettes]; (4) Defendants' manipulation of cigarette design . . .; and (5) the adverse health effects of exposure to secondhand smoke." *Id.* at 104a. The court ordered that these statements be published in newspapers and on television, and placed on cigarette packages and point-of-sale advertising in hundreds of thousands of retail outlets. *Id.*

The district court found that, "in terms of formal organization," the purported "enterprise" operated through industry organizations, *id.* at 1926a, and that those organizations had been permanently disbanded, *id.* at 1926a-1928a. Consistent with these findings, the district court failed to identify *any* alleged joint activity after 1998, let alone joint activity amounting to an "enterprise." Nonetheless, with no evidentiary citation or explanation, the district court found that those organizations "can readily be re-activated" such that the "enterprise" is reasonably likely to recur. *Id.* at 1928a. The court further concluded that the possibility that defendants might have unspecified "temptations" or "opportunities" to resurrect the enterprise or "take similar unlawful actions in order

to maximize their revenues" sufficed to impose injunctive relief. *Id.* at 2009a.

3. Defendants appealed, and the government cross-appealed the denial of certain remedies. The court of appeals issued a decision affirming in part and reversing in part. *Id.* at 1a-101a.

The panel affirmed the district court's liability decision in its entirety. Departing from RICO's plain language and invoking circuit precedent, the court of appeals held that defendants, as corporations, may be part of an association-in-fact enterprise. *Id.* at 18a-22a. The court acknowledged that "§ 1961(4) *nowhere expressly mentions*" association-in-fact enterprises comprised of corporations, but nonetheless concluded that such an association is an enterprise under RICO. *Id.* at 19a (emphasis added). The court relied on Congress's "switching between 'means' and 'includes' in the same definitional provision, . . . signal[ing] its intent to distinguish between exhaustive and non-exhaustive lists." *Id.* at 26a. The court concluded that Congress, by using the word "includes" to introduce the list of enterprises, "retain[ed] the *possibility* that some additional non-legal entities beyond" the specified "group of individuals associated in fact" could constitute an enterprise. *Id.* at 27a. The court did not explain why a group of *corporations* could form an unenumerated, non-legal entity enterprise consistent with the statutory text, much less how that type of enterprise promotes RICO's goal of combating organized crime.

Although the alleged fraud in this case implicated defendants' First Amendment rights, the panel refused without discussion to follow this Court's decision in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), and to engage in independent review of the district court's factual findings. Pet. App. 16a. Instead, the panel deferred to the district court under the clearly erroneous standard of Federal Rule of Civil Procedure 52. *Id.* Thus, even though the panel observed that "we may not have reached all the same conclusions as the district court," it affirmed the district court's factual findings "under the highly deferential clearly erroneous standard." *Id.* at 67a. The panel then used those findings to reject defendants' First Amendment defense to statements made to defeat governmental regulation or in the unfolding scientific and public health debate regarding smoking and disease. *See id.* at 43a-46a. The panel labeled as "fraudulent" speech which the district court found was directed at public regulation, not consumers' purchases; speech that never reached consumers (*e.g.*, congressional and agency statements on proposed regulations); and even speech that never went outside the defendant companies. *Id.* at 41a-43a.

Moreover, while recognizing that "at times the [district] court articulated a 'collective intent' standard" of "dubious" validity, the panel upheld the district court's specific intent finding with respect to the frauds. *Id.* at 40a-41a. In fact, the panel relieved the government of its litigation position and the district court's adoption of a collective intent standard, concluding that an *individual's* specific

intent can be inferred from the *corporation's* collective knowledge. *Id.* at 32a-41a. The panel failed to explain how, consistent with defendants' Due Process rights and the notice requirements of federal litigation, it could adopt this theory when the government never pursued, and actually disclaimed, an individual intent theory in favor of a collective intent theory at trial.

4. On July 31, 2009, Lorillard and other defendants filed separate petitions for rehearing and rehearing en banc. The petitions addressed, among other issues, the court of appeals' holding that a group of corporations could form an association-in-fact enterprise. The court of appeals denied the petitions on September 22, 2009. *Id.* at 2182a-2185a. The court of appeals has stayed the mandate pending disposition of defendants' petitions for writs of certiorari.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Holding That A Group Of Corporations Can Form An Association-In-Fact Enterprise Under RICO Warrants This Court's Review.

The court of appeals' holding that a group of corporations associated in fact can constitute a RICO "enterprise" merits this Court's review. The statutory language, structure, and purpose make clear that a group of corporations is not "a group of individuals associated in fact." Moreover, several members of this Court have expressed skepticism that the definition of a RICO enterprise extends to a group of corporations associated in fact. *See Mohawk*

Tr. at 28-54. The Court has recently suggested, in passing and in *dicta*, that the definition of "enterprise" does not "foreclose the possibility" that there "might" be enterprises beyond those "specifically enumerated." *Boyle v. United States*, 129 S. Ct. 2237, 2243 n.2 (2009). But *Boyle* did not decide that question, let alone the more specific question presented by this Petition: whether a group of corporations associated in fact constitutes a RICO enterprise.

The question presented is exceptionally important. The "enterprise" element of a RICO offense is the primary feature that distinguishes RICO liability from other civil and criminal prohibitions. If there are no meaningful limitations on what entities can constitute an association-in-fact enterprise, then the differences between RICO and other liability regimes will dissolve and conduct that Congress had no intention of regulating under RICO will be swept within its domain. Without intervention by this Court, the Government and private parties will continue to misuse RICO in cases where it was never meant to apply.

The Court should intervene in this case, particularly in view of the draconian remedies sought by the Government, which illustrate the enormous consequences of expanded RICO liability. Lower courts, which have adopted a uniform but incorrect position on the definition of "enterprise," are unlikely to change course on their own, especially after this Court's *dicta* in *Boyle*. This Court should not allow its passing treatment of this critical issue to constitute the last word on the matter. Having expressed doubts in *Mohawk* about the propriety of

the very enterprise theory on which hinges the "most important civil RICO action that the Government has ever brought," 05-92 U.S. Pet. at 8, this Court should now squarely address whether a group of corporations can form an association-in-fact enterprise.

A. Congress Excluded Corporations From An Association-in-Fact Enterprise.

1. Section 1961(4) provides that a RICO "'enterprise'" "includes [1] any *individual*, partnership, *corporation*, association, or other legal entity, and [2] any union or group of *individuals* associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (emphases added). Congress expressly identified *both* individuals and corporations in the "legal entity" category of enterprises, but it identified *only* "individuals" in the association-in-fact category of enterprises. *See United States v. Turkette*, 452 U.S. 576, 581-82 (1981) (discussing the two categories of RICO enterprises). Given this disparate statutory language, a group of corporations cannot be an association-in-fact enterprise unless (1) the term "individuals" includes "corporations" or (2) the list of association-in-fact enterprises is not exhaustive *and* includes a group of corporations. As the government has conceded, the first possibility is untenable, given the distinct treatment of an "individual" and a "corporation" in the first part of the enterprise definition. *See* Brief for the United States as *Amicus Curiae* Supporting Respondents, *Mohawk Indus., Inc. v. Shirley Williams*, No. 05-465, at 6 (2006); *see also Mohawk* Tr., at 31 (statement of Roberts, C.J.) ("[W]hatever an individual is it's different than a

corporation."); 1 U.S.C. § 1 (distinguishing between "individuals" and "corporations"). The court of appeals focused on the second possibility, and held that the list of association-in-fact enterprises is not exhaustive and includes a group of corporations. That holding is contrary to the statutory language.

Congress expressly listed individuals, corporations, and all other legal entities as falling within the "legal entity" category of enterprise, but listed *only* individuals as falling within the association-in-fact category. As this Court has repeatedly explained, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 252 (1989) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks and alteration omitted)). The *Russello* canon applies with special force here because Congress chose to specify corporations (and other legal entities) as included in the first category of enterprises and to omit them from the other category *within the very same provision.*

The court of appeals nevertheless held that Congress's use of the term "includes" in the definition of enterprise, and its use of the term "means" in other definitional provisions of RICO, indicates that Congress intended to set out a non-exhaustive list of RICO enterprises, and to include a group of corporations as an association-in-fact enterprise. Pet. App. 26a. As this Court has explained, whether the word "includes" introduces an

exhaustive list depends on context. *See Helvering v. Morgan's, Inc.*, 293 U.S. 121, 125-26 (1934). "The term 'includes' may sometimes be taken as synonymous with 'means'"; the term may also "import[] a general class, some of whose particular instances are those specified in the definition." *Id.* at 125 & n.1.

This Court recently suggested in passing that the use of that term in Section 1961(4) leaves open "*the possibility* that the term ['enterprise'] *might* include, in addition to the specifically enumerated entities, others that fall within the ordinary meaning of the term." *Boyle*, 129 S. Ct. at 2243 n.2 (emphasis added). This was *dicta*, because the alleged association-in-fact enterprise in *Boyle* was a group of *individuals*, and the sole issue before the Court was whether "an association-in-fact enterprise under [RICO] must have an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages." *Id.* at 2241 (internal quotation marks omitted). For several reasons, moreover, the use of the term "includes" in Section 1961(4) does not expand the scope of an association-in-fact enterprise to encompass a group of corporations.[4]

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[4] Although Petitioner believes that the *dicta* in *Boyle* warrant full examination by the Court, Petitioner's position does not depend on a conclusion that RICO's definition of an association-in-fact enterprise is exhaustive. This Court could assume that the definition is non-exhaustive and hold that, whatever other types of association-in-fact enterprises might be possible, a group of corporations cannot form an association-in-fact enterprise because corporations are specifically included in the (continued...)

First, Congress used the term "includes" in three other definitional provisions in Section 1961, and each of those provisions is exhaustive. For example, Section 1961(10) states that "Attorney General" "includes" the Attorney General of the United States and his or her designees. 18 U.S.C. § 1961(10). Plainly, the term does not encompass other persons not described in the statute–such as the legal officers of state governments or other nations, or even private citizens–simply because the definition uses the word "includes." *See also id.* § 1961(3) ("'[P]erson' includes any individual or entity capable of holding a legal or beneficial interest in property."); *id.* § 1961(9) ("'[D]ocumentary material' includes any book, paper, document, record, recording, or other material."). Because Congress used both "means" and "includes" to introduce exhaustive definitions in other provisions of Section 1961, the use of "includes" in Section 1961(4) does not demonstrate that Congress intended its definition of "enterprise" to be non-exhaustive.

Second, Congress used the phrase "including but not limited to" for the purpose of introducing non-exhaustive lists in Section 1964(a). Because Congress used this specific terminology to introduce a non-exhaustive list, a binary comparison of the words "includes" and "means" cannot determine whether the definition of enterprise is exhaustive. *See Mohawk* Tr., at 42-43 (statement of Scalia, J.) (observing that there is a "big difference" between

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legal-entity category of enterprises but omitted from the association-in-fact category.

statutes that use the term "means" to introduce some definitions and "includes" for others and statutes such as RICO that contain a third formulation such as "includes . . . without limitation"). Instead, because the word "includes" is used to denote an exhaustive list in other definitional provisions of Section 1961, the word should be given the same meaning in Section 1961(4). *See, e.g., U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 460 (1993) ("Presumptively, identical words used in different parts of the same act are intended to have the same meaning." (internal quotation marks and citation omitted)).

This Court recently held that a definition introduced by the term "includes" is exhaustive. *See Carcieri v. Salazar*, 129 S. Ct. 1058 (2009). The statute at issue in *Carcieri* provided that the term "Indian" "shall include" various categories of persons. *See* 25 U.S.C. § 479. The United States argued that introducing the definition of "Indian" with the phrase "shall include" meant that there was a gap that the agency could fill with regulations. *Carcieri*, 129 S. Ct. at 1066. Despite the fact that other defined terms were introduced with the more restrictive phrase "shall be construed to refer to," 25 U.S.C. § 479, the Court held that Congress had "explicitly and comprehensively defined the term ['Indian'] by including only three discrete definitions." *Carcieri*, 129 S. Ct. at 1066. Similar reasoning supports the conclusion that the term "includes" in Section 1961(4) is exhaustive.

Third, even if Congress's use of the term "includes" could be interpreted to render the definition of an association-in-fact enterprise non-

exhaustive, Congress expressly included corporations in the legal entity category of enterprise while omitting them from the association-in-fact category of enterprise in the very same provision. If Congress had intended to include corporations and other legal entities in the "association-in-fact" category, it easily could have done so, either by repeating the list from the first category, or by using the word "persons" instead of "individuals." *See* 18 U.S.C. § 1961(3) (defining "person" to include "any individual or entity"). Given the stark contrast in the statutory language used to define the two categories of enterprise, the word "includes" has to do more work than it can bear to expand a "group of individuals associated in fact" to mean "a group of corporations associated in fact."

Nothing about Congress's description of the two categories of enterprises suggests that Congress intended to "import[] a general class" of association-in-fact enterprises, *see Helvering*, 293 U.S. at 126 n.1, that would include the very entities that it listed only in the first "legal-entity" category. *See Mohawk* Tr. at 51 (noting "the peculiarity of this definition[,] in which, although it starts out with the word includes, the[re] follows [a] listing, A, B, C, and D, and then it repeats one, *and only one*, of the items on the list and says groups of those items, i.e., individuals, are included" (emphasis added)); *see also id.* at 42 (Alito, J.) ("[T]he only thing that seems possibly to be omitted from the list is what's involved here, which is a group consisting of a corporation or . . . other legal entity . . . and natural persons.").

2. This reading of the statutory text is reinforced by consideration of the purpose of RICO.

Far from viewing corporations as a threat that needed to be addressed, Congress enacted RICO largely out of concern that corporations would be *victimized* by organized crime. *See Turkette*, 452 U.S. at 588-93 (discussing RICO's legislative history). This Court has observed that "the major purpose of [RICO] is to address the infiltration of legitimate business by organized crime." *Id.* at 591. The first category of "legal entity" enterprises, *see id.* at 581-82, corresponds to that purpose, as it contemplates the use of a legitimate entity as a vehicle for the commission of criminal activity.

While "the infiltration of legitimate businesses was of great concern," *id.* at 593, Congress also "recognized that organized crime uses its primary sources of revenue and power—illegal gambling, loan sharking and illicit drug distribution—as a springboard into the sphere of legitimate enterprise," *id.* at 591. Congress sought to "strik[e] at the source of th[is] problem," *id.* at 593, by defining an enterprise to include a group of individuals "associated in fact" for the purpose of engaging in criminal activity, *see* Samuel A. Alito, Jr., *Racketeering Made Simple[r], in The RICO Racket* 1, 3-4 (G. McDowell ed. 1989) (explaining that RICO had "two aims: . . . to make it unlawful for *individuals* to function as members of organized criminal groups [and] . . . to stop organized crime's infiltration of legitimate business" (emphasis added)).

There is no indication that Congress intended RICO to be used to combat *corporations* engaged in joint criminal activity. "Congress did not enact RICO because it was concerned that criminal conspiracy

law, applied to corporations, didn't adequately touch interstate commerce." *Mohawk* Tr., at 36 (statement of Roberts, C.J.). Thus, Congress's purposes in enacting RICO confirm that the omission of corporations from the category of association-in-fact enterprises was intentional.

B. Other Principles Of Statutory Interpretation Support The Conclusion That A Group Of Corporations Is Not An Association-In-Fact Enterprise.

Even if the Court were to conclude that Congress's use of the term "includes" creates ambiguity as to whether a group of corporations can be an association-in-fact enterprise, the doctrine of constitutional avoidance, the unworkable nature of the corporations-associated-in-fact-enterprise theory, and the rule of lenity all support resolving that ambiguity by restricting the category of association-in-fact enterprises to those expressly identified in the definition.

1. Members of this Court repeatedly have expressed concerns about the breadth and vagueness of the RICO statute. *See Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 471-72 (2006) (Thomas, J., concurring in part and dissenting in part) ("Numerous justices have expressed dissatisfaction with either the breadth of RICO's application, or its general vagueness at outlining the conduct it is intended to prohibit.") (internal citations omitted); *H.J., Inc.*, 492 U.S. at 255-56 (Scalia, J., concurring) (stating that the majority's failure to "remove[] the vagueness" concerning the "pattern of racketeering activity" "bodes ill for the day when [a constitutional

challenge to RICO] is presented" (internal quotation marks omitted)). As the cardinal feature of RICO, the "enterprise" concept must have a definite meaning. In the absence of discernible restrictions on what combinations or groupings can form an association-in-fact enterprise, RICO's reach becomes virtually unbounded and its application unduly vague. The "enterprise" definition should be read to avoid these constitutional difficulties. *See Gomez v. United States*, 490 U.S. 858, 864 (1989) (The Court "avoid[s] an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question.").

2. Moreover, interpreting the term "includes" to expand the category of association-in-fact enterprises to a group of corporations undermines the basic structural requirements of RICO. In particular, allowing plaintiffs to allege that a group of corporations is an enterprise creates a serious risk of judicial misapplication of several of the critical elements in a RICO case. This case pointedly illustrates these risks.

RICO requires that an enterprise be distinct from the RICO defendant. In *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001), this Court held that the statute requires "such distinctness" because RICO liability "depends on showing that the defendants conducted or participated in the conduct of the 'enterprise's affairs,' not just their *own* affairs." *Id.* at 163 (internal quotation marks omitted). Unlike joint individual activity, such as the classic example of members of an organized crime family working together for the good of the

family, determining whether a group of corporate defendants are working for the benefit of the "enterprise" of corporations and not for the corporations individually is exceptionally difficult, if not impossible.

Here, for example, the government alleged and the court of appeals determined that defendants "join[ed] together in a decades-long conspiracy to deceive the American public about the health effects and addictiveness of smoking cigarettes." Pet. App. 6a. But the alleged scheme did not result in pooled proceeds that were allocated among the defendants; rather, each defendant sold its own brands of cigarettes in competition with the other defendants.

The most vivid illustration of this defect in the government's case is the alleged fraudulent scheme involving "light" cigarettes. The district court never once suggested that the affairs of the enterprise related in any way to "lights," because defendants never *coordinated* with respect to "lights." Instead, *all* of the alleged fraudulent speech to consumers about "lights" involved *parallel* conduct, where Defendants were vigorously competing against each other in the development, advertising, and marketing of such cigarettes. Pet. App. 971a-1256a, 1904a-1908a; *cf. Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553-54 (2007) ("[C]onscious parallelism, a common reaction of firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence . . . is not in itself unlawful." (internal quotation marks and citation omitted)). Thus, there is simply no basis for concluding that the defendants were conducting or participating in the

conduct of the affairs of the so-called "enterprise," as opposed to their own affairs.[5]

Moreover, RICO "directly aims" at the "high ranking individuals" within an enterprise, *Cedric Kushner*, 533 U.S. at 165, who operate or manage the enterprise's affairs through racketeering. *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993). Because a corporation is inanimate, the legal fiction that a corporation has engaged in conduct that violates a statute must be based on the conduct of the individuals who acted on its behalf. *See Jordan v. Medley*, 711 F.2d 211, 217 (D.C. Cir. 1983) (Scalia, J.).

The government could have named individual corporate employees under the plain language of Section 1961(4) and sought to impose liability on defendants based on the actions of those individuals. *But see Cedric Kushner*, 533 U.S. at 166. Yet by pursuing the "corporations associated in fact" interpretation of Section 1961(4) without naming any

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[5] Including corporations in the category of association-in-fact enterprises has led to an even more direct evisceration of RICO's distinctness requirement. Recognizing that a deep-pocketed corporate defendant cannot also constitute the RICO enterprise, some plaintiffs have simply alleged that the corporation "associated" with its own agents: this tactic has created a circuit split that this Court previously recognized warranted its review. *See* Petition for a Writ of Certiorari, *Mohawk Industries, Inc. v. Williams*, No. 05-465, 2005 WL 2566486 (first question presented), *cert. granted*, 546 U.S. 1075, *dismissed and remanded*, 547 U.S. 516 (2006) (ordering further consideration in light of intervening decision).

individuals as members of the enterprise, the government portrays an "enterprise" that: (1) cannot be distinguished from any combination of employees of the corporate defendants, whether culpable or not; (2) cannot be assessed for continuity of its membership or its connection to any predicate acts; (3) provides no means of distinguishing "corporate" affairs from "enterprise" affairs; and (4) provides defendants with no notice of which specific employees were purportedly members of the "enterprise" and whose conduct they must defend. Moreover, for groups of corporations, there is an increased risk that an "enterprise" will impermissibly be found based merely on the existence of a "pattern of racketeering activity," even though the two are "separate element[s] that must be proved." *Boyle*, 129 S. Ct. at 2245.

Here, for example, because the Master Settlement Agreement with the States terminated the actual legal entities that allegedly were used to coordinate the frauds, *see* Pet. App. 1926a-1928a, the government was forced to allege an enterprise that the district court described as "[l]ike an amoeba" that "changed its shape to fit current needs," *id* at 1925a. The impossibility of identifying the "structure" of this so-called "enterprise" explains the district court's characterization. *See Boyle*, 129 S. Ct. at 2244 ("an association-in-fact enterprise must have a structure"—*i.e.*, "a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose"). It likewise explains why the district court ultimately defined the enterprise in terms of the alleged "overarching scheme to defraud

smokers and potential smokers," Pet. App. 1949a, thereby committing the legal error of equating the enterprise with "the pattern of racketeering activity," *Boyle*, 129 S. Ct. at 2245 (citation omitted).

3. Finally, to the extent that the word "includes" creates ambiguity as to the scope of the "enterprise" definition, the rule of lenity requires that the definition be narrowly construed to exclude a group of corporations associated in fact from the definition of an enterprise. *See Mohawk* Tr., at 47 (statement of Scalia, J.) (asserting that the "enterprise" definition is "at least . . . ambiguous" and asking why the rule of lenity should not apply). The rule of lenity applies to RICO because the statute contains both civil and criminal penalties, and the law is clear that a statute must be interpreted "consistently" whether its application arises "in a criminal or noncriminal context." *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *see also H.J. Inc.*, 492 U.S. at 255 (RICO "must, even in its civil applications, possess the degree of certainty required for criminal laws.") (Scalia, J., concurring).

Because the definition of enterprise clearly excludes a group of corporations or is at least ambiguous, this Court should grant certiorari and reverse the court of appeals' decision. *See United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality opinion) (applying the "venerable rule [of lenity]" and concluding that the term "proceeds" in the federal money-laundering statue must be given the narrower of two equally possible meanings).

C. This Question Presented Is Exceptionally Important.

While RICO has been applied to a very broad array of conduct, that is no reason to avoid imposing limitations on RICO's reach that are well-supported by the language, structure, and purpose of the statute. Absent this Court's intervention, the RICO statute will be used, as it has been used in this case, to target corporations engaged in joint corporate activity and to seek remedies that threaten their existence. As Justice Breyer observed, construing the "enterprise" definition to include a group of corporations associated in fact "would RICO-ize, with its treble damages and private plaintiffs and everything, vast amounts of ordinary commercial activity," something Congress "has no reason whatsoever for doing." *Mohawk* Tr., at 44. That threat is of nationwide concern because it will chill the types of "joint ventures" that this Court has emphasized "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984).

The absence of a circuit split should not prevent the Court from granting review. According to the government, this is the most important civil RICO action it has ever brought, *see* U.S. Pet. 05-92, at 8, and the case hinges on its flawed theory that a group of corporations associated in fact constitutes a RICO enterprise. This would not be the first case in which this Court granted review of an exceptionally important issue of federal statutory interpretation in the absence of a circuit conflict. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 294-95 & n.1 (2001) (Stevens,

J., dissenting) ("Just about every Court of Appeals has either explicitly or implicitly held that a private right of action exists to enforce all of the regulations issued pursuant to Title VI. . . . No Court of Appeals has ever reached a contrary conclusion."); *see also* E. Gressman et al., *Supreme Court Practice* § 4.13, at 267 (9th ed. 2008) ("Many of the cases coming to the Supreme Court on certiorari involve the construction and application of acts of Congress . . . . In some of them it can be shown that there is a conflict among lower courts . . . . In others, however, the importance of the issue is the major basis for securing review."). This Court's review is especially necessary in this case, because the position of the lower courts is highly unlikely to change in light of this Court's *dicta* in *Boyle*. This Court's initial, passing suggestions on this vitally important issue, contained in a footnote, should not be the Court's last word.

Moreover, a circuit split exists on the related question of whether a corporation and its agents can constitute an association-in-fact enterprise. This Court granted review on that question, but did not decide it, in *Mohawk Industries, Inc. v. Williams*, No. 05-465, 2005 WL 2566486, *cert. granted*, 546 U.S. 1075, *dismissed and remanded*, 547 U.S. 516 (2006). A resolution in petitioner's favor here on the antecedent question of whether a corporation may form an association-in-fact enterprise would resolve that split.

Finally, this case presents an ideal vehicle to decide whether a group of corporations can constitute an association-in-fact enterprise. Unlike in recently denied certiorari petitions, in which it appeared that

the issue might not have been squarely pressed or passed upon below, *see Mohawk Indus., Inc. v. Williams*, 127 S. Ct. 1381 (2007); *Microsoft Corp. v. Odom*, 552 U.S. 985 (2007), in this case the issue was both "squarely pressed" *and* "passed upon below," *see* Pet. App. 17a-29a. Moreover, the correct definition of enterprise is a threshold issue that would dispose of the entire case, obviating the need for this Court to address the other errors in the judgment below.

II. The Court of Appeals' Decision Raises Additional Issues That Warrant This Court's Review.

A. The D.C. Circuit Applied The Wrong Standard Of Review To Factual Findings That Implicate the First Amendment.

This Court has held that an appellate court must conduct an independent review of the record when the availability of First Amendment protection depends on a trial court's factual findings. *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984). The D.C. Circuit nonetheless refused to conduct an independent review, and instead upheld the district court's factual findings under a deferential clearly erroneous standard of review. Pet. App. 16a. The court expressly acknowledged that it "may not have reached all the same conclusions as the district court" had it conducted an independent examination of the record. *Id.* at 67a.

This Court should review the D.C. Circuit's use of the clearly erroneous standard of review to

resolve a circuit split regarding when the First Amendment requires independent appellate review of factual findings. Three circuits hold, consistent with *Bose*, that independent appellate review is required whenever First Amendment protection depends on whether speech is false or misleading. *See Byrum v. Landreth*, 566 F.3d 442 (5th Cir. 2009); *Revo v. Disciplinary Bd. of the Sup. Ct. of N.M.*, 106 F.3d 929 (10th Cir. 1997); *Falanga v. State Bar of Ga.*, 150 F.3d 1333 (11th Cir. 1998). In contrast, the Fourth Circuit agrees with the D.C. Circuit that de novo appellate review is not required. *See SEC v. Pirate Investor LLC*, 580 F.3d 233 (4th Cir. 2009).

B. The Court of Appeals Erred By Denying First Amendment Protection to a Wide Range of Non-Commercial Speech.

The vast majority of the speech at issue in this case is non-commercial speech involving important public issues. *See, e.g.*, Pet. App. 654a-656a, 1540a-1541a, 1604a-1605a. Much of this speech opposed government action aimed at regulating the tobacco industry. *Id.* at 857a-861a, 1962a-1963a. Other statements involved opinions regarding issues of scientific debate or assertions of facts that are true under at least one reasonable interpretation. *Id.* at 654a-656a.

The D.C. Circuit's decision that none of this speech is entitled to First Amendment protection conflicts with decisions of this Court and other courts of appeals. For example, defendants' efforts to affect governmental regulation of the tobacco industry are protected under the *Noerr-Pennington* doctrine. *See*

E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136 (1961). Likewise, "[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974). Courts of appeals have held, contrary to the D.C. Circuit's decision, that fraud statutes prohibit only false factual statements, not opinions on "one side of a . . . scientific dispute," *Luckey v. Baxter Healthcare Corp.*, 183 F.3d 730, 733 (7th Cir. 1999), or ambiguous statements that are true under a "reasonable interpretation[]," *United States v. Migliaccio*, 34 F.3d 1517, 1525 (10th Cir. 1994).

C. The First Amendment Protects The Use Of Terms That Accurately Summarize Tar And Nicotine Levels.

The district court found that, as a result of a behavior known as "compensation," cigarettes with less tar—as measured by the Cambridge Filter Method—were not healthier than full flavor cigarettes. Pet. App. 972a. Based on this finding, the district court concluded that the use of the terms "light" and "low-tar" to describe low-tar cigarettes was fraudulent because those terms "*implied* a health benefit as a result of lowered tar levels." *Id.* at 1140a (emphasis added). The court of appeals affirmed this conclusion. *Id.* at 11a, 38a-39a.

Contrary to the court of appeals' decision, the use of these terms is not fraudulent because it accurately summarizes the results of the Cambridge Filter Method. Even if the use of these terms could

be interpreted to imply a health benefit, that is not the only reasonable interpretation that could be drawn from the terms. It is also reasonable to conclude that the terms "light" and "low-tar" simply described the cigarettes' relative tar levels as measured by the Cambridge Filter Method, and therefore fraud cannot be inferred from their use. *See, e.g.*, *Migliaccio*, 34 F.3d at 1525. Petitioner cannot be faulted for relying on the Cambridge Filter Method to measure tar and nicotine levels because the Federal Trade Commission *approved* "'factual statement[s] of the tar and nicotine content' . . . as measured by the Cambridge Filter Method." Pet. App. 47a (quoting *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 549 (2008)).

D. The Injunction, Which Is Not Predicated On The Likelihood Of Future RICO Violations, Improperly Tracks Broad Statutory Commands And Compels Speech.

A district court may issue an injunction under Section 1964(a) of RICO only to "prevent and restrain" future RICO violations. 18 U.S.C. § 1964(a). The D.C. Circuit's conclusion that the injunction meets this requirement cannot be squared with the 1998 Master Settlement Agreement between the tobacco companies and the States, or with the Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (June 22, 2009). The Master Settlement Agreement dismantled the industry organizations that allegedly operated the enterprise and prohibited defendants from engaging in future joint racketeering activity of

the type challenged by the government here. Pet. App. 1926a-1928a. Moreover, the newly enacted legislation prohibits or subjects to extensive federal oversight the activities on which the district court premised its future violations determination. *See* Pub. L. No. 111-31, 123 Stat. 1776. The injunction therefore exceeds the district court's authority under RICO and should be vacated.

The injunction is also impermissibly vague. It prohibits defendants from, among other things, making false statements and committing racketeering acts. Pet. App. 71a-72a. This vaguely worded injunction, which purports to prohibit defendants from violating the law, contravenes Federal Rule of Civil Procedure 65(d) and this Court's decisions interpreting that rule. Rule 65(d) requires "[e]very order granting an injunction . . . [to] describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." Fed. R. Civ. P. 65(d); *see Hartford-Empire Co. v. United States*, 323 U.S. 386, 410 (1945) (relying on Fed. R. Civ. P. 65(d) to vacate an injunction that prohibited violations "'as charged in the complaint'"). Despite this prohibition on referencing other documents, the D.C. Circuit nevertheless upheld the injunction by "read[ing]" it "in the context of the district court's legal conclusions and 4,088 findings of fact." Pet. App. 71a-74a.

Finally, the court of appeals erred in affirming the injunction's requirement that defendants express "corrective" public policy views through a media campaign in "major newspapers" and a "major television network." Pet. App. 83a. This aspect of

the injunction violates the First Amendment's prohibition on compelled speech. *See, e.g., Wooley v. Maynard*, 430 U.S. 705 (1977). It also conflicts with the Seventh Circuit's rejection of an order mandating corrective statements. *See Nat'l Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157 (7th Cir. 1977).

CONCLUSION

The petition for a writ of certiorari should be granted.

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STATUTORY APPENDIX

STATUTORY APPENDIX

18 U.S.C. § 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to

the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1592 (relating to peonage, slavery, and trafficking in persons)., section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), section 1960 (relating to illegal money transmitters), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor

vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), sections 175-178 (relating to biological weapons), sections 229-229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality

Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact, although not a legal entity.

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a

State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any

department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. § 1962. Prohibited Activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class,

and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." 18 U.S.C. § 1962.

18 U.S.C. § 1964. Civil Remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the

activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(5) (4) (4)

Nos. 09-976, 09-977, 09-1012

Supreme Court, U.S.
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In The
Supreme Court of the United States

PHILIP MORRIS USA INC.
(f/k/a PHILIP MORRIS, INC.) and R.J. REYNOLDS TOBACCO CO., et al. and LORILLARD TOBACCO CO.,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION OF TOBACCO-FREE KIDS ACTION FUND, ET AL.

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RULE 29.6 STATEMENT

Respondents, who were granted intervention below, are Tobacco-Free Kids Action Fund, American Cancer Society, American Heart Association, American Lung Association, Americans for Nonsmokers' Rights, and National African American Tobacco Prevention Network. They have no parent companies, and do not issue stock.

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18 U.S.C. § 1964(b) 1

STATEMENT

In a case brought by the United States pursuant to its authority under 18 U.S.C. § 1964(b), the district court concluded that for decades the major manufacturers of cigarettes engaged in a massive coordinated campaign to deceive millions of American consumers, and particularly teenagers, about the toxicity and addictiveness of cigarettes. Pet. App. 119a-1885a. The court concluded that this misconduct violates RICO, and is likely to continue. *Id.* 1885a-1921a.

The district court imposed several remedies. First, in light of extensive record evidence that "[d]efendants have known for decades that there is no clear health benefit from smoking low tar/low nicotine cigarettes," but nonetheless "extensively – and successfully – marketed and promoted their low tar/light cigarettes as less harmful," Pet. App. 1255a, the court enjoined the defendants from "conveying any express or implied health message or health descriptor for any cigarette brand" including "the words 'low tar,' 'light,' 'ultra light,' 'mild,' [and] 'natural. . . .'" Final Judgment and Remedial Order ("Final Order") § II.A.4; *see also* Pet. App. 2041a ("[T]he only way to restrain Defendants from their longstanding and continuing fraudulent efforts to deceive smokers, and potential smokers, and the American public about 'light' and 'low tar' cigarettes is to prohibit them from using any descriptor which conveys a health message").

Second, because defendants have for decades made "fraudulent public statements about cigarettes" in various media, the district court directed them to issue corrective communications in the "same vehicles which Defendants have themselves historically used to promulgate false smoking and health messages." Pet. App. 2047a-48a. These communications are to be made on defendants' websites, cigarette packaging, and countertop displays, as well as in major newspapers and on television stations. Final Order § II.B.

Finally, in light of the overwhelming evidence concerning defendants' "fraudulent statements about the devastating consequences of smoking," Pet. App. 2058a, the court enjoined the defendants from "making, or causing to be made in any way, any material false, misleading, or deceptive statement or representation, or engaging in any public relations or marketing endeavor that is disseminated to the United States public and that misrepresents or suppresses information concerning cigarettes." Final Order § II.A.3.

The court of appeals affirmed the district court's determination on liability and affirmed most of the remedial portion of the district court's order, but directed that certain portions of the order be narrowed.[1]

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[1] *See* Pet. App. 81a-83a, 88a-89a (directing that corrective statements be narrowly confined, and that the requirement for

(Continued on following page)

The petitions for a writ of certiorari challenging the propriety of these remedies should be denied. None of the remedy issues addressed by Petitioners warrants review by this Court, and, in any event, Petitioners' arguments – most of which have not yet even been presented to the district court – are premature at this time.[2]

REASONS FOR DENYING THE PETITIONS

A. THE DESCRIPTOR BAN DOES NOT WARRANT REVIEW BY THIS COURT.

Petitioners contend that the district court erred in banning the use of descriptors such as "light" and "low tar" because these terms were approved by the Federal Trade Commission ("FTC"). They also contend that the court of appeals' affirmance of the ban conflicts with rulings of other courts of appeals that have relied on FTC's alleged approval of these terms. R.J. Reynolds Tobacco Company Petition for Certiorari ("RJR Pet.") at 29-34; Lorillard Tobacco Company

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countertop displays be reconsidered); *id.* 74a-75a (directing that the injunction be modified to exempt certain foreign activities). The district court also imposed other remedies not appealed and not at issue here.

[2] Because Respondents intervened below on the issue of remedies, *see* Pet. App. 89a, this Opposition does not address the Petitioners' requests for review of the lower courts' liability determinations.

Petition for Certiorari ("Lorillard Pet.") at 30-31. Petitioners are mistaken.

As the court of appeals correctly and unanimously ruled, Pet. App. at 47a, Petitioners' argument regarding the FTC "is entirely foreclosed by" this Court's recent decision in *Altria v. Good*, which made clear that the FTC has never *"condoned representations of* [tar and nicotine] *yields through the use of 'light' or 'low tar' descriptors."* 129 S. Ct. 538, 550 (2008); *see also id.* ("the FTC has no long-standing policy authorizing collateral representations based on Cambridge Filter Method test results"); *id.* at 551 (noting that in 2008 the FTC rescinded its guidance concerning the Cambridge Filter Method) (citing 73 Fed. Reg. 74,500 (2008)).

Particularly in light of this Court's ruling that the FTC has *not* approved the use of such descriptors, the district court did not err in barring the defendants from continuing to use these descriptors based on record evidence that defendants "falsely marketed and promoted low tar/light cigarettes as less harmful than full-flavored cigarettes," thereby misleading consumers into believing that smoking light and low tar cigarettes in fact provides a health benefit. *See* Pet. App. 971a. The *Altria* ruling also resolves Petitioners' claimed circuit split on this issue.[3]

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[3] Given this deliberate fraud, Lorillard Tobacco Company's further contention that the descriptors are entitled to First Amendment protection, Lorillard Pet. at 30-31, is also without

(Continued on following page)

Petitioner Philip Morris USA Inc. also asserts that plaintiffs can no longer demonstrate that a descriptor ban is necessary because Congress recently passed new legislation that will require that such descriptors be approved by the Food and Drug Administration. Philip Morris USA Inc. Petition for Certiorari ("Philip Morris Pet.") at 28-31. However, this is a factual question that must be resolved in the district court in the first instance, not in this Court. *E.g. Salazar v. Buono*, 2010 WL 1687118, *15 (U.S. Apr. 28, 2010) (remanding to district court to undertake "the highly fact-specific . . . inquiry" necessary to determine whether new legislation warrants a modification to the court's injunction); *Horne v. Flores*, 129 S. Ct. 2579, 2600 (2009) (remanding for district court to consider whether changed circumstances, including a new law, warranted modification of the court's remedy).

This is particularly true in light of the district court's findings – affirmed by the court of appeals – that continuing legal violations are likely despite Petitioners' contention that the State Master Settlement Agreement similarly precluded ongoing legal violations. Pet. App. 2016a-21a; *see also* Philip Morris Pet. at 28-31. Should Petitioners be dissatisfied with the district court's decision as to whether the new

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merit. *See, e.g., Cent. Hudson Gas & Elec. Corp. v. Pub Serv. Comm'n*, 447 U.S. 557, 563 (1980) ("The government may ban forms of communication more likely to deceive the public than to inform it").

legislation obviates the need for the descriptor ban, that issue may be addressed on appeal at that time. It is entirely premature at this juncture.

Petitioners also fail to mention that the tobacco industry *has challenged the new legislation*. *See Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512 (W.D. Ky. 2010). Because the outcome of that suit also may bear on this argument, the continuing propriety of the descriptor ban is an inherently factual matter that belongs before the district court, which can consider the new lawsuit and any other appropriate factors. *E.g. Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 369 (1992) (remanding to district court to consider whether changed circumstances warranted an alteration in a remedial decree).

B. THE ORDER DIRECTING CORRECTIVE STATEMENTS ALSO DOES NOT WARRANT REVIEW.

Petitioners' challenges to the district court's order on corrective statements, which the court of appeals unanimously upheld, also do not warrant review in this Court. *See* RJR Pet. at 34-36; Lorillard Pet. at 32-33. Contrary to Petitioners' claim, there is no disagreement among courts of appeals as to whether corrective statements may be imposed to address "a long history of deception which has so permeated the consumer mind that the 'claim was believed by consumers long after the false advertising had

ceased. . . .'" *Nat'l Commission on Egg Nutrition v. FTC* ("*NCEN*"), 570 F.2d 157, 164 (7th Cir. 1977) (quoting *Warner Lambert v. FTC*, 562 F.2d 749, 771 (D.C. Cir. 1977)). The district court's extensive findings that for decades defendants engaged in a massive fraud to deceive consumers concerning, *inter alia*, the adverse health effects of smoking and the nature of addiction constitute the very "long history of deception" that warrants these corrective communications here. *NCEN*, 570 F.2d at 164.

Moreover, the rulings on which Petitioners rely – all of which concerned challenges to the *particular* language used in *specific* corrective statements – highlight that their challenge to the district court's corrective statements order is also premature, because the district court has not yet required any specific statements in this case. To the contrary, the court of appeals has specifically directed that the district court, in fashioning corrective statements on remand, "ensure that the corrective disclosures are carefully phrased so they do not impermissibly chill protected speech." Pet. App. 88a-89a.

C. REVIEW OF THE INJUNCTION AGAINST FURTHER FRAUDULENT STATEMENTS ALSO IS NOT WARRANTED.

Finally, Petitioners' challenge to the court's injunction also does not warrant review. Petitioners point to no circuit conflict or other basis for review; rather they argue that the injunctive decree is too

vague. Philip Morris Pet. at 31-34; Lorillard Pet. at 32. Not only is this not a basis for granting review by this Court, *see* Supreme Court Rule 10, but in any event, given the breadth of defendants' misconduct, the district court's injunction against "making, or causing to be made in any way, any material false, misleading, or deceptive statement or representation . . . that misrepresents or suppresses information concerning cigarettes," Final Order § II.A.3, was entirely appropriate. *United States v. Ward Baking Co.*, 376 U.S. 327, 332 (1964) ("when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts") (other citations omitted); *NLRB v. Express Pub. Co.*, 312 U.S. 426, 436 (1941) ("A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future unless enjoined, may fairly be anticipated from the defendant's conduct in the past."); *see also* Pet. App. 74a (a "'record of continuing and persistent violations of the (statute) would indicate that that kind of a (general) decree was wholly warranted in this case'") (quoting *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949)).

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari concerning the remedies imposed by the district court should be denied.

Respectfully submitted,

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(09-976) (09-977) (09-979) (09-980) (09-1012)

Nos. 09-976, 09-977, 09-979, 09-980 and 09-1012

In the Supreme Court of the United States

PHILIP MORRIS USA INC., FKA PHILIP MORRIS, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

R.J. REYNOLDS TOBACCO COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ALTRIA GROUP, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

BRITISH AMERICAN TOBACCO (INVESTMENTS), LIMITED, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

LORILLARD TOBACCO COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The petitions collectively present the following questions:

1. Whether the court of appeals correctly held that an unincorporated association of corporations and individuals may form an "enterprise" under 18 U.S.C. 1961(4).

2. Whether the court of appeals was required to undertake independent appellate review of the district court's unchallenged findings of fact establishing fraud.

3. Whether the court of appeals correctly held that the First Amendment does not protect petitioners' public statements because they were fraudulent.

4. Whether the court of appeals correctly held that petitioners' statements about "light" and "low tar" cigarettes were false, misleading, and not authorized by the Federal Trade Commission.

5. Whether the court of appeals correctly rejected the argument that any reasonable likelihood of future violations was eliminated by the signing of the Master Settlement Agreement or, alternatively, by the passage of the Family Smoking Prevention and Tobacco Control Act.

6. Whether the court of appeals correctly sustained relief prohibiting specified conduct and requiring corrective statements.

7. Whether the court of appeals correctly concluded that British American Tobacco (Investments) Limited, a foreign corporation, was subject to RICO when it used the interstate mails and wires and engaged in other conduct in the United States in furtherance of a scheme to defraud American consumers, and when it conspired with American companies to pursue that fraudulent scheme.

8. Whether the court of appeals correctly rejected Altria's contention that it did not act with specific intent to defraud.

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In the Supreme Court of the United States

No. 09-976

PHILIP MORRIS USA INC., FKA PHILIP MORRIS, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 09-977

R.J. REYNOLDS TOBACCO COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

No. 09-979

ALTRIA GROUP, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 09-980

BRITISH AMERICAN TOBACCO (INVESTMENTS), LIMITED, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 09-1012

LORILLARD TOBACCO COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-100a) is reported at 566 F.3d 1095. The opinion of the district court (Pet. App. 101a-2181a) is reported at 449 F. Supp. 2d 1.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 2009. Petitions for rehearing were denied on September 22, 2009 (Pet. App. 2182a-2815a). On November 10, 2009, the Chief Justice extended the time within which to file petitions for a writ of certiorari to and including February 19, 2010, and the petitions were filed on that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States brought this action under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, alleging that petitioners engaged in a coordinated scheme to deceive Americans about the addictiveness and health risks of cigarettes, thereby enhancing petitioners' cigarette sales and associated profits. The district court held a nine-month bench trial, admitting nearly 14,000 exhibits and hearing live testimony from 84 witnesses and written testimony from 162 witnesses. Pet. App. 8a. The voluminous evidentiary record includes large numbers of petitioners' internal documents, see, *e.g.*, *id.* at 36a-39a, as well as testimony from numerous former tobacco industry employees and participants that detail petitioners' fraudulent behavior, *e.g.*, *id.* at 35a-36a.

Based on that record, the district court issued a final decision documenting the "overwhelming evidence" that

petitioners conducted and conspired to conduct the affairs of a RICO enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c) and (d), by engaging in a decades-long scheme to defraud that petitioners executed in part through their use of mail and wire communications. Pet. App. 103a, 114a-115a, 1887a; see *id.* at 1885a-2004a. The court's opinion, which spans nearly an entire volume of the Federal Supplement, includes more than 4000 enumerated findings of fact and details the affairs of petitioners' enterprise and petitioners' pattern of mail and wire fraud. See *id.* at 119a-1885a.

The district court found, and the court of appeals unanimously affirmed, that the government proved that petitioners participated in the conduct of an enterprise and "knowingly and intentionally engaged in a scheme to defraud smokers and potential smokers, for purposes of financial gain, by making false and fraudulent statements, representations, and promises." Pet. App. 1888a; *id.* at 5a-6a, 30a. "Put more colloquially, and less legalistically, over the course of more than 50 years, [petitioners] lied, misrepresented, and deceived the American public, including smokers and the young people they avidly sought as 'replacement smokers,' about the devastating health effects of smoking and environmental tobacco smoke, they suppressed research, they destroyed documents, they manipulated the use of nicotine so as to increase and perpetuate addiction, they distorted the truth about low tar and light cigarettes so as to discourage smokers from quitting, and they abused the legal system in order to achieve their goal." *Id.* at 1887a-1888a.

As the court of appeals observed, a summary of petitioners' conduct "cannot adequately present the volumes

of evidence underlying the district court's findings of fact." Pet. App. 37a. "[T]he evidentiary picture must be viewed in its totality in order to fully appreciate how massive the case is against [petitioners], how irresponsible their actions have been, and how heedless they have been of the public welfare and the suffering caused by" their fraudulent conduct. *Id.* at 112a. The following summary thus provides but an outline of the nature and history of the RICO enterprise as found by the district court and affirmed by the D.C. Circuit.

1. In 1953, petitioners' RICO enterprise was established when the presidents of Philip Morris, Reynolds, Brown & Williamson, Lorillard, and American met to develop a joint response to the growing public concern about the health risks of smoking. Pet. App. 122a-127a, 1923a-1925a. The companies, normally rivals in the cigarette market, agreed that no manufacturer would "seek a competitive advantage by inferring to its public that *its* product is less risky than others," *id.* at 124a, and jointly issued a full-page advertisement entitled "A Frank Statement to Cigarette Smokers" that they published in newspapers nationwide on January 4, 1954. *Id.* at 128a-132a. "The Frank Statement set forth the industry's 'open question' position that it would maintain for more than forty years—that cigarette smoking was not a proven cause of lung cancer; that cigarettes were not injurious to health; and that more research on smoking and health issues was needed." *Id.* at 129a.

At its core, petitioners' scheme was designed to "mislead[] consumers in order to maximize [petitioners'] revenues by recruiting new smokers (the majority of whom are under the age of 18), preventing current smokers from quitting, and thereby sustaining the industry." Pet. App. 2011a; see *id.* at 1888a. The goal of the "open

question" strategy, as a senior Philip Morris executive later explained, was to create the impression of scientific uncertainty and thereby "give smokers a psychological crutch and a self-rationale to continue smoking." *Id.* at 417a. The companies declared in the Frank Statement that "[w]e accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business"; asserted that "[w]e believe the products we make are not injurious to health"; and promised to fund objective research into "all phases of tobacco use and health" by scientists "of unimpeachable integrity and national repute." *Id.* at 131a-132a.

Yet at the time the companies issued the "Frank Statement," they already had "documented a large number of known carcinogens contained in cigarette smoke." Pet. App. 396a. Over the ensuing decades, petitioners developed a sophisticated understanding of the toxicity and addictiveness of cigarettes that outpaced that of the public, regulators, and public health authorities. *Id.* at 9a-11a. As the public's knowledge increased, the companies intensified the level of their deceptions. The district court, as the court of appeals explains, catalogued "countless examples of deliberately false statements" by petitioners regarding the health effects of smoking and secondhand smoke, the addictiveness of nicotine and petitioners' manipulation of nicotine delivery to create and sustain addiction, and the claimed health benefits of "light" cigarettes. *Id.* at 45a. The district court found that petitioners' "efforts to deny and distort the scientific evidence of smoking's harms are demonstrated by not only decades of press releases, reports, booklets, newsletters, television and radio appearances, and scientific symposia and publications, but also by evidence of their concerted[] efforts to attack and undermine the

studies in mainstream scientific publications such as the Reports of the Surgeon General." *Id.* at 1894a. In addition, "[a]s their internal documents reveal, [petitioners] engaged in massive, sustained, and highly sophisticated marketing and promotional campaigns to portray their light brands as less harmful than regular cigarettes." *Id.* at 1904a. Petitioners "have known for decades that filtered and low tar cigarettes do not offer a meaningful reduction of risk, and that their marketing which emphasized reductions in tar and nicotine was false and misleading." *Id.* at 1905a-1906a.

Petitioners executed their scheme to defraud by utilizing an array of jointly created entities, the most visible of which was the Tobacco Institute (TI), which served for four decades as "the leading public voice of [petitioners]." Pet. App. 195a; *id.* at 119a. Petitioners jointly financed TI's operations through payments exceeding $600 million, *id.* at 183a, and their chief executive officers served on TI's Executive Committee, *id.* at 180a, which had the "'final voice on TI matters' and Tobacco Institute statements." *Id.* at 216a (citation omitted). TI "created, issued, and disseminated press releases, public statements, advertisements, brochures, pamphlets, and other written materials on behalf of [petitioners]" that denied "any link between smoking and disease," denied that "nicotine was addictive," denied that "cigarette companies marketed to youth," denied that secondhand smoke "posed a health risk," and "discredit[ed] scientists and public health officials who took a different position on these issues." *Id.* at 196a. As internal TI documents admit: "Our basic position in the cigarette controversy is subject to the charge, and maybe subject to a finding, that we are making false or

misleading statements to promote the sale of cigarettes." *Id.* at 186a.

The Tobacco Institute was but one part of a "network of interlocking organizations" that petitioners created to maintain unity and discipline. Pet. App. 1777a. The Institute's Executive Committee emphasized internally that it was "of prime importance that the industry maintain a united front and that if one or more companies were to conduct themselves as a matter of self interest, particularly in advertising, obvious vulnerability would be the result." *Id.* at 218a (citation omitted). To that end, the International Committee on Smoking Issues (ICOSI) and its successor organizations, the International Tobacco Information Center (INFOTAB) and the Tobacco Documentation Centre (TDC), were established to enable Philip Morris, Reynolds, British American Tobacco (BATCo) and other tobacco companies to "meet discreetly to develop a defensive smoking and health strategy for major markets," including the United States. *Id.* at 1619a (citation omitted); see also *id.* at 320a-335a. BATCo acknowledged internally that "[t]he aim of ICOSI is defensive research aimed at throwing up a smoke screen and to throw doubt on smoking research findings which show smoke causes diseases." *Id.* at 1624a (citation omitted). The members of this group included Philip Morris, Reynolds, Lorillard, BATCo and TI, as well as foreign tobacco companies. *Id.* at 327a-328a.

Petitioners also formed a variety of organizations to create what they termed "marketable science." Pet. App. 1687a. For example, through the Council for Tobacco Research (CTR) and Lawyers' Special Accounts, petitioners jointly financed research programs that were directed by company lawyers and calculated to yield

favorable results. *Id.* at 240a-275a. Petitioners regularly cited the conclusions of the scientists funded through these programs as if they were the objective results of disinterested research, without revealing that the scientists had, in fact, been funded by the industry. *Id.* at 195a.

Petitioners likewise created organizations that appeared to have no connection to the industry, but were in fact designed to generate purportedly independent evidence for use as "ammunition" in manipulating public opinion. Pet. App. 1614a (citation omitted). For example, petitioners created the Center for Indoor Air Research (CIAR) in a manner designed "to 'hide' industry involvement," *id.* at 1652a (citation omitted), and CIAR's influential papers on secondhand smoke failed to disclose the organization's connection to the tobacco industry. *Id.* at 1651a-1653a. Similarly, Indoor Air International (IAI) held itself out as "a 'learned society' dedicated to 'promoting indoor air quality,'" *id.* at 1695a-1696a (citation omitted), while in reality it was funded by Philip Morris and BATCo and run by the law firm of Covington & Burling, *id.* at 1695a-1698a, which served as legal counsel for TI and the industry. *Id.* at 181a, 214a. "All billing was processed through Covington & Burling to avoid any direct connection to the industry." *Id.* at 1695a.[1]

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[1] The district court found that attorneys actively facilitated and "played an absolutely central role" in petitioners' illegal activity "[a]t every stage" by, *inter alia*, "direct[ing] scientists as to what research they should and should not undertake"; "vett[ing] scientific research papers and reports"; "hid[ing] the relationship between [scientific witnesses] and the industry"; "devis[ing] and carr[ying] out document destruction policies"; and taking "shelter behind baseless assertions of the attorney client privilege." Pet. App. 106a.

2. In 2006, after developing an immense trial record, the district court held that petitioners had participated in the conduct of the affairs of an enterprise through a pattern of racketeering activity, and conspired to do so, in violation of 18 U.S.C. 1962(c) and (d). Pet. App. 1885a, 1995a. The court determined that petitioners' enterprise had the common purpose of preserving and expanding the cigarette market through fraud, *id.* at 1923a-1925a; that it operated through formal and informal organizations, *id.* at 1925a-1928a; and that it has functioned as a continuous unit since 1953, *id.* at 1928a-1930a.

The district court specifically found that petitioners "knowingly and intentionally engaged in a scheme to defraud smokers and potential smokers, for purposes of financial gain, by making false and fraudulent statements, representations, and promises." Pet. App. 1888a. It explained that, "[i]n the majority of instances, the authors of the fraudulent statements alleged as Racketeering Acts were executives, including high level scientists—CEOs, Vice Presidents, Heads of Research & Development, not entry level employees—at each of the [petitioner] companies who would reasonably be expected to have knowledge of the company's internal research, public positions, and long term strategies." *Id.* at 1984a. The court found it "absurd to believe that the highly-ranked representatives and agents of these corporations and entities had no knowledge that their public statements were false and fraudulent," explaining that the "Findings of Fact are replete with examples of C.E.O.s, Vice-Presidents, and Directors of Research and Development, as well as [petitioners'] lawyers, making statements which were inconsistent with the internal

knowledge and practice of the corporation itself." *Id.* at 1890a-1891a.

Based on its findings about the profitability of petitioners' participation in the enterprise and the sophistication and resilience of their scheme to defraud, the district court found a reasonable likelihood of future violations. Pet. App. 2007a-2021a. The court accordingly granted injunctive relief enjoining petitioners from committing further acts of racketeering or fraud relating to the marketing of cigarettes, *id.* at 2069a-2070a; from reconstituting specified organizations, *id.* at 2069a; and from making express or implied health claims about cigarettes, including use of descriptors such as "light" or "low tar," *id.* at 2070a-2071a. The court's order requires that petitioners make corrective statements in specified media, *id.* at 2071a-2077a; maintain publicly accessible document depositories, *id.* at 2077a-2084a; and disclose certain marketing data to the government, *id.* at 2084a.

3. Petitioners appealed, challenging the district court's liability ruling and injunctive relief. In their appellate briefs, petitioners made almost no mention of the district court's factual findings and presented no arguments purporting to show that any such findings were erroneous.[2] At oral argument, counsel representing all petitioners (App., *infra*, 1a) represented that, although petitioners did not "agree with the fact findings of the

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[2] The electronic versions of the government's appellate briefs on DVD-ROMs explain the evidentiary record in detail (*e.g.*, Gov't C.A. Br. 5-58) and include an embedded hyperlink for every record citation, enabling the reader to display immediately the relevant page of the record. A similar DVD version of the district court's opinion also includes an embedded hyperlink for each of its numerous record citations. Cf. Order, No. 06-5267 (D.C. Cir. July 28, 2008) (directing clerk to file lodged DVDs).

district court," "we're bringing legal challenges to the court" and "haven't challenged * * * any fact finding." *Id.* at 5a, 7a.

4. In May 2009, the court of appeals unanimously affirmed in part, vacated in part, and remanded. Pet. App. 1a-100a. The court's decision affirmed the district court's liability findings in all significant respects, but remanded for further proceeding on "four discrete issues." *Id.* at 6a, 100a.

The court of appeals rejected petitioners' threshold argument that petitioners could not be liable under RICO for participating in the conduct of the affairs of an "enterprise" because, in petitioners' view, RICO "provides an exclusive list of possible enterprises that covers [only] groups of *individuals* associated in fact, not mixed groups of individuals *and corporations* associated in fact." Pet. App. 18a. The court held that the definition of "enterprise" in 18 U.S.C. 1961(4) is non-exhaustive and includes groups of corporations associated in fact (like petitioners). Pet. App. 18a-20a, 28a. The court reasoned that petitioners' contrary argument was inconsistent both with RICO's text and the uniform decisions of all ten courts of appeals to have addressed the question, and that RICO's broad statutory understanding of "enterprise" ensures that sophisticated racketeers cannot evade liability by employing the corporate form. *Id.* at 18a-29a.

The court of appeals concluded that other purported legal challenges were not properly presented. For example, although the court indicated that it shared petitioners' doubt that a corporation's specific intent to defraud could properly be established by aggregating the knowledge of disparate corporate employees under a theory of "collective intent," it did "not pass on the mer-

its of such a standard * * * because the district court relied on a permissible view of specific intent." Pet. App. 33a, 41a. The court explained that the "overwhelming indirect and circumstantial evidence was sufficient to allow the district court to reasonably infer that the high level executives, including 'CEOs, Vice Presidents, [and] Heads of Research & Development' for [petitioners] knew about their respective companies' 'internal research, public positions, and long term strategies'" and "then made, caused to be made, and approved public statements contrary to this knowledge." *Id.* at 39a (citation omitted).

The court of appeals rejected petitioners' First Amendment defenses, concluding that petitioners' public statements were "clearly and deliberately false" and therefore fell outside the scope of protected speech. Pet. App. 43a-45a. The court explained that it was "not dealing with accidental falsehoods, or sincere attempts to persuade," and that "[petitioners] knew of their falsity at the time and made the statements with the intent to deceive." *Id.* at 45a. The court similarly held that "*Noerr-Pennington* protection" for attempts to persuade the legislature or executive to take particular action "does not apply" because the doctrine does not extend to "deliberately false or misleading" statements and petitioners' racketeering acts were themselves "intended to defraud consumers." *Id.* at 44a, 46a.

The court rejected petitioners' contention that the Federal Trade Commission (FTC) had "blessed their use of labels such as 'light' and 'low tar'" cigarettes, explaining that the argument was foreclosed by this Court's decision in *Altria Group, Inc.* v. *Good*, 129 S. Ct. 538 (2008) (*Altria*). Pet. App. 46a-47a. In addition, the court emphasized that the district court "did not find

liability solely based on the use of descriptors such as 'light' and 'low tar'"; rather, the district court permissibly found that "[petitioners] orchestrated 'highly sophisticated marketing and promotional campaigns to portray their light brands as less harmful than regular cigarettes,'" despite their knowledge of the falsity of that claim. *Id.* at 47a-48a.

The court further concluded that the Master Settlement Agreement (MSA) executed in separate lawsuits by the tobacco companies and several States did not eliminate the likelihood of petitioners' future violations. Pet. App. 61a-67a. It explained that petitioners "began to evade and at times even violate the MSA's prohibitions almost immediately after signing the agreement" and that petitioners' failure to alter their conduct after the MSA amply warranted the district court's conclusion that future violations were likely. *Id.* at 64a, 67a.

The court rejected challenges to liability that were specific to petitioners Altria and BATCo, Pet. App. 55a-60a, and it rejected most of petitioners' challenges to the district court's injunctive order. The court explained that the injunctions "sufficiently specify the activities enjoined," *id.* at 73a, and that the district court permissibly required that corrective statements appear in the same media that petitioners used "to promulgate false smoking and health messages." *Id.* at 83a.[3]

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[3] The court vacated the finding of liability as to CTR and TI because those entities had been dissolved pursuant to the MSA. Pet. App. 100a. The court also vacated certain minor provisions of the injunction and remanded for reconsideration of those "discrete issues," such as the application of the injunction to petitioners' overseas subsidiaries and clarification of the requirements for point-of-sale displays. *Ibid.* The panel also rejected the government's cross-appeal on remedies. *Id.* at

5. Petitioners filed five separate rehearing petitions, all of which the court of appeals denied without dissent. Pet. App. 2183a.

Meanwhile, petitioners Philip Morris, Reynolds, and Lorillard filed a "Suggestion Of Mootness And Motion For Partial Vacatur," arguing that the June 2009 passage of the Family Smoking Prevention and Tobacco Control Act (FSPTCA), Pub. L. No. 111-31, Div. A, 123 Stat. 1776, had rendered aspects of the injunction moot. The government's opposition explained that the FSPTCA did not render the injunction moot and that any request to modify the injunction in light of the legislation should be directed to the district court in the first instance. Gov't Opp. to Suggestion of Mootness 3-4, 9, 11-12. The court of appeals denied the suggestion of mootness and vacatur motion without opinion.

ARGUMENT

Collectively, petitioners suggest that nearly every aspect of the unanimous decision of the court of appeals presents a significant legal error warranting certiorari. That suggestion is without merit. The D.C. Circuit correctly resolved the only pure question of law the petitioners presented in a ruling that reflects the uniform judgment of all ten courts of appeals to have considered the issue. The remaining legal issues that petitioners now raise are either not properly presented on the record in this case, not subject to any conflict, or otherwise unworthy of review. The petitions should therefore be denied.

92a-99a. The government's petition for a writ of certiorari in No. 09-978 seeks review of the remedial aspect of the court's judgment.

A. An Unincorporated Association Of Corporations And Individuals May Form A RICO Enterprise

Petitioners Philip Morris and Lorillard contend that certiorari is warranted because the court of appeals purportedly erred in holding that a RICO "enterprise" may consist of corporations and individuals associated in fact. 09-976 Pet. (PM Pet.) 24-28; 09-1012 Pet. (Lorillard Pet.) 11-28. In their view, 18 U.S.C. 1961(4) "provides an exclusive list of possible enterprises" and that list includes "groups of *individuals* associated in fact" but "not mixed groups of individuals *and corporations* associated in fact." Pet. App. 18a. That contention lacks merit. RICO's text and the reasoning of *Boyle* v. *United States*, 129 S. Ct. 2237 (2009), demonstrate that RICO provides non-exhaustive examples of an "enterprise" that illustrate, but do not restrict, the ordinary meaning of the term. All ten courts of appeals to have confronted the question have likewise concluded—without as much as a dissenting opinion from even one judge—that corporate entities associated in fact may form a RICO enterprise. No further review is warranted.

1. a. Congress routinely defines statutory terms in one of two ways. Exhaustive statutory definitions—which state precisely what the defined term "means"—establish a self-contained meaning for the term that "excludes any meaning that is not stated." *Burgess* v. *United States*, 553 U.S. 124, 130 (2008) (citation omitted). Terms so defined take their meaning from the definition Congress provides in statute instead of the "term's ordinary meaning." *Stenberg* v. *Carhart*, 530 U.S. 914, 942 (2000). By contrast, non-exhaustive definitions merely state that the defined term "includes" certain enumerated things. In that context, "the term 'includ[es]' is not one of all-embracing definition, but con-

notes simply an illustrative application of the general principle," *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941), that itself builds upon the "ordinary connotation of the [underlying] term." *Groman* v. *Commissioner*, 302 U.S. 82, 88 (1937); *id.* at 85-86; *American Sur. Co.* v. *Marotta*, 287 U.S. 513, 517 (1933) (the term "'include' is frequently, if not generally, used as a word of extension or enlargement" in definitional provisions).

RICO's definitional section, 18 U.S.C. 1961, provides a non-exhaustive definition of "enterprise." Section 1961(4) states that the term "'enterprise' *includes* any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. 1961(4) (emphasis added). As the court of appeals explained, Congress's "use of the word 'includes' indicates that RICO's list of 'enterprises' is non-exhaustive." Pet. App. 25a-26a. The term therefore encompasses groups that fall within the ordinary meaning of "enterprise"—such as "a group of individuals, corporations, or partnerships associated in fact"—even though Section 1961(4) does not "expressly mention[] this type of association." *Id.* at 19a; see *id.* at 21a. The broader context of Section 1961 confirms "the non-exhaustive nature of 'includes'" because Congress chose in that provision to "alternat[e] between the words 'means' and 'includes' to introduce the section's various definitions," thereby "signal[ing] its intent to distinguish between [the] exhaustive and non-exhaustive lists" defining RICO's statutory terms. *Id.* at 26a.

One month after the court of appeals issued its decision, this Court confirmed that Section 1961(4)'s definition of "enterprise" is non-exhaustive. In *Boyle*, this

Court made clear that Section 1961(4)'s "obviously broad" "enumeration of included enterprises" does "not purport to set out an exhaustive definition of the term" and does "not specifically define the outer boundaries of the 'enterprise' concept." 129 S. Ct. at 2243 & n.2. Like the court below, *Boyle* concluded that Congress's disparate use of "means" and "includes" in RICO's definitional section demonstrates that the inclusive definition of "enterprise" retains the "ordinary meaning" of the term and therefore "does not foreclose the possibility that the term might include" other types of enterprises other than the "specifically enumerated" ones. *Id.* at 2243 n.2 (citing the Court's similar interpretation of Section 1961 in *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 238 (1989)). *Boyle* therefore reasoned that the meaning of "enterprise" reflected in "ordinary usage" informs the meaning of the term in RICO and held, based on that ordinary meaning, that an association in fact of individuals "must have a purpose" to qualify as an "enterprise." *Id.* at 2244.

Boyle's reasoning is fatal to Lorillard's contention (Pet. 14-18) that Section 1961(4) exhaustively describes the entities that may constitute an "enterprise." In resolving the question whether "an association-in-fact enterprise must have an ascertainable structure beyond that inherent in the pattern of racketeering activity," *Boyle*, 129 S. Ct. 2244 (internal quotation marks and citation omitted), the Court expressly held that Section 1961(4) does not provide "an exhaustive definition" of "enterprise" or "define the outer boundaries" of the term. *Id.* at 2243 & n.2. If Lorillard were correct that RICO's text provides a wholly exhaustive definition, then the ordinary meaning of "enterprise" would have been irrelevant and the (purportedly exhaustive) defini-

tional text in Section 1961(4) would have controlled. See *Carhart*, 530 U.S. at 942 (citing cases). The Court instead interpreted "enterprise" based on the "meaning of the term in ordinary usage" as reflected in dictionary definitions precisely because the definitional text was not itself exhaustive. See *Boyle*, 129 S. Ct. at 2244.

The court of appeals' decision also follows from the logic of several decisions of this Court that have repeatedly drawn a distinction between "means" and "includes" when Congress has alternated between those terms to introduce statutory definitions. Those decisions have consistently found that such "disparate inclusion or exclusion" (*Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted)) to reflect an intent to provide a non-exhaustive definition of those terms that Congress has defined to "include" specifically enumerated items. See, *e.g.*, *Boyle*, 129 S. Ct. at 2243 n.2 (construing Section 1961(4)); see also, *e.g.*, *United States* v. *New York Tel. Co.*, 434 U.S. 159, 169 & n.15 (1977); *Helvering* v. *Morgan's, Inc.*, 293 U.S. 121, 125 n.1 (1934); *American Sur. Co.*, 287 U.S. at 517; cf. *H.J. Inc.*, 492 U.S. at 237 (concluding that the definitional use of "require" instead of "mean" in Section 1961(5) reflects that the scope of the defined term is "broad").

Lorillard asserts (Pet. 16) that Section 1961's other definitions beginning with "includes" are "exhaustive" even though it offers argument only for the definition of "Attorney General." Even that definition, however, is not "exhaustive." The enumeration in Section 1961(10) does not, for example, specifically include a person selected by the President to perform temporarily "the functions and duties" of the Attorney General, 5 U.S.C. 3345(a)(2) and (3), or an independent counsel that could have been appointed by a court to prosecute RICO viola-

tions, 28 U.S.C. 593(b), 599 (expired 1999), neither of whom are "designated by the Attorney General" under the definition. See 18 U.S.C. 1961(10); cf. *Authority of the President to Name an Acting Attorney General*, 31 Op. Off. Legal Counsel ___ (2007), http://www.justice.gov/olc/2007/authority-of-the-president-name-ag-070908.pdf. Lorillard makes no attempt to demonstrate that any other definition in Section 1961 that begins with "includes" is exhaustive, but simply quotes (Pet. 16) the definition of "person" and "documentary material" without elaboration.

Based on Congress's direction in RICO that courts may issue appropriate orders, "including, but not limited to," three categories of orders, 18 U.S.C. 1964(a), Lorillard also contends (Pet. 16-17) that Congress used the term "includes" differently in Section 1961 because Congress omitted the phrase "but not limited to." But that supplementary language in Section 1964(a)—which is not a definitional section—simply emphasizes the breadth of the appropriate remedial orders that it authorizes. Section 1961 had no need for such emphasis because it employs "includes" in a significantly different context: the juxtaposition of "means" and "includes" in that section itself makes clear that the inclusive definitions are non-exhaustive. See Pet. App. 27a.

Lorillard's reliance (Pet. 17) on *Carcieri* v. *Salazar*, 129 S. Ct. 1058 (2009), is also misplaced. Although *Carcieri* interpreted a single, free-standing provision defining "Indian" to "include" certain categories of Indians as comprehensively defining the term, 25 U.S.C. 479, it did so because other statutory provisions specifically showed that Congress recognized that the definition did not "encompass tribes other than those" in the statutory enumeration. 129 S. Ct. at 1066. And, unlike RICO, the

definition in *Carcieri* does not disparately employ "means" and "includes" to define different statutory terms, reflecting Congress's intent to enact exhaustive and non-exhaustive definitions.

b. Because the ordinary meaning of "enterprise" is not restricted by Section 1961(4)'s non-exhaustive "enumeration of included enterprises," *Boyle*, 129 S. Ct. at 2243 & n.2, Lorillard's heavy emphasis on that enumeration is misplaced. As *Boyle* explains, the ordinary meaning of "enterprise" encompasses "a 'venture,' 'undertaking,' or 'project.'" *Id.* at 2244 (citation omitted). And Lorillard's own arguments show that "a group of corporations associated in fact" constitute, in common parlance, just such a "joint venture[]." See Lorillard Pet. 26. So long as a joint venture by corporate entities reflects a common "purpose," embodies "relationships among those associated with the enterprise," and has "longevity sufficient to permit those associates to pursue the enterprise's purpose," *Boyle*, 129 S. Ct. at 2244, it qualifies as an "enterprise" under RICO.

Philip Morris resists the conclusion that the "ordinary meaning" of enterprise can include a group of corporate entities, asserting that "a group of unaffiliated corporations informally cooperating in an effort to influence government policy" would not be thought of as an "enterprise." PM Pet. 26-27. But that assertion (which reflects a factual premise far removed from this case) cannot be squared with this Court's explanation that "an association-in-fact enterprise is simply a continuing unit that functions with a common purpose." *Boyle*, 129 S. Ct. at 2245. Even an "'informal' group" without much "structure" can constitute an enterprise if its members coordinate their actions to pursue a common objective. *Ibid.*

c. Petitioners' restrictive interpretation of Section 1961(4) disregards this Court's repeated admonition that "RICO is to be read broadly." *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 497 (1985); accord *Boyle*, 129 S. Ct. at 2243 (citing cases). Congress followed a "pattern * * * utilizing terms and concepts of breadth" in RICO, including in the statute's inclusive definition of "enterprise." *Russello*, 464 U.S. at 21; see also *NOW* v. *Scheidler*, 510 U.S. 249, 257 (1994) ("RICO broadly defines 'enterprise'"); *United States* v. *Turkette*, 452 U.S. 576, 580-581, 583 (1981) (construing "enterprise"). If there were any doubt on that score, Congress's express statutory direction that RICO be "liberally construed to effectuate its remedial purposes" confirms the "expansive" scope of its "concept of an association in fact." *Boyle*, 129 S. Ct. at 2243 (quoting RICO, Pub. L. No. 91-452, § 904(a), 84 Stat. 947); see also S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969) ("enterprise" is defined "to include associations in fact, as well as legally recognized associative entities," and that "infiltration of any associative group by any individual or group capable of holding a property interest can be reached"); H.R. Rep. No. 1549, 91st Cong., 2d Sess. 56 (1970) (same).

The broad scope of the enterprise concept reflects RICO's origins. "RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime." *Sedima*, 473 U.S. at 498. And, while Congress undoubtedly intended the statute to be used to combat organized crime, "Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime." *H.J. Inc.*, 492 U.S. at 248; accord *NOW*, 510 U.S. at 260. RICO accordingly targets criminal associations that "extend well be-

yond[] those traditionally grouped under the phrase 'organized crime'" in order to target "a wide range of criminal activity, taking many different forms" and involving "a broad array of perpetrators operating in many different ways." *H.J. Inc.*, 492 U.S. at 243, 248-249.

Congress's decision to provide a broad, nonexhaustive definition of "enterprise" capturing the full range of associational forms that might be employed by sophisticated criminals is consistent with its intent that RICO be "a weapon against the sophisticated racketeer as well as (and perhaps more than) the artless." *United States* v. *Perholtz*, 842 F.2d 343, 353 (D.C. Cir.), cert. denied, 488 U.S. 821 (1988) (rejecting petitioners' interpretation of "enterprise" for its "bizarre result[s]"). As the D.C. Circuit explained, an association of individuals and legal entities that exhibits common purpose, organization, and continuity is plainly among "the kinds of entities Congress had in mind." Pet. App. 28a (emphasis omitted) (citing *Turkette*, 452 U.S. at 583). Congress had no reason to doubt that corporations, labor unions, partnerships, or other legal entities would be capable of entering into the sort of dangerous *de facto* alliances that characterize RICO enterprises. See *id.* at 24a (explaining that, on petitioners' theory, "racketeers who would otherwise constitute an association-in-fact might evade RICO's grasp by virtue of their ability to operate through corporations and establish complex networks of companies, kickbacks, and contracts to achieve their elicit ends"). As the Seventh Circuit observed:

> Surely if three individuals can constitute a RICO enterprise, as no one doubts, then the larger association that consists of them plus entities that they control can be a RICO enterprise too. Otherwise while three criminal gangs would each be a RICO enter-

> prise, a loose-knit merger of the three, in which each retained its separate identity, would not be, because it would not be an association of individuals. That would make no sense.

United States v. *Masters*, 924 F.2d 1362, 1366 (7th Cir.), cert. denied, 500 U.S. 919, and 502 U.S. 823 (1991); *United States* v. *Huber*, 603 F.2d 387, 393-394 (2d Cir. 1979) (petitioners' reading would "perversely insulate the most sophisticated racketeering combinations from RICO's sanctions"), cert. denied 445 U.S. 927 (1980); see also *McCullough* v. *Suter*, 757 F.2d 142, 143-144 (7th Cir. 1985) ("[W]e cannot believe that Congress would have wanted gangsters to be able to escape the clutches of section 1962(c) just by avoiding the corporate form.").

d. Lorillard contends that vagueness concerns, practical considerations, and the rule of lenity, should "resolv[e any] ambiguity" in Section 1961(4) by limiting enterprises to those expressly listed. Lorillard Pet. 20; *id.* at 20-25. But Section 1961(4) is an inclusive, not exclusive, definition whose text employs capacious, not ambiguous terms. Congress specifically directed that RICO's terms be "liberally," not narrowly, construed to effectuate the statute's remedial goals, *Boyle*, 129 S. Ct. at 2243, and this Court has declined repeated requests to narrow the scope of RICO's "enterprise" concept with restrictions that themselves are not found in the statutory text. See, *e.g.*, *id.* at 2245-2246 (declining to impose limits that are not "fairly inferred from the language of the statute"); *NOW*, 510 U.S. at 260-261 (refusing to adopt economic-motive limitation); *Turkette*, 452 U.S. at 580-581 (declining to limit "enterprise" to legitimate associations because RICO imposes "no restriction upon the associations embraced" by the term and because Congress could have, but did not, "narrow[] the sweep of

the definition by inserting" additional text). The Court has repeatedly rejected similar appeals to narrow RICO's provisions based on the rule of lenity. *Boyle*, 129 S. Ct. at 2246-2247; see also *NOW*, 510 U.S. at 262; *Sedima*, 473 U.S. at 492; *Turkette*, 452 U.S. at 588 n.10; *Russello*, 464 U.S. at 29.

e. Petitioners' remaining contentions largely reflect policy arguments of the kind this Court has rejected "in favor of the clear but expansive text of the statute," *Boyle*, 129 S. Ct. 2246-2247 (collecting cases). Lorillard asserts that the "purpose of RICO" is to protect corporations from being "victimized by organized crime," not "to combat corporations engaged in joint criminal activity." Lorillard Pet. 18-19 (emphases omitted). But as the court of appeals explained, there is no dispute that corporations can be RICO *defendants* under the statute's plain terms. Pet. App. 21a (discussing 18 U.S.C. 1961(3), 1962(c)). Indeed, this Court has emphasized that "[RICO's] use 'against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued.'" *H.J. Inc.*, 492 U.S. at 249 (quoting *Sedima*, 473 U.S. at 499). Quite the contrary, the "ability to use RICO against businesses engaged in a pattern of criminal acts" is a result that itself is "inherent in the statute as written." *Ibid.* (quoting *Sedima*, *supra*); see also *Sedima*, 473 U.S. at 499 (explaining that the fact that plaintiffs have brought "fraud cases * * * against" nominally legitimate businesses under RICO "does not demonstrate ambiguity" in the statute, "[i]t demonstrates breadth") (citation omitted).

2. Petitioners ultimately provide no sound reason for this Court to revisit RICO's definition of "enter-

prise" so soon after *Boyle* addressed the term's meaning. Petitioners concede that their interpretation of Section 1961(4) finds no support in the "uniform" decisions of the courts of appeals, Lorillard Pet. 12, 27, which all agree "with the D.C. Circuit's conclusion that a group of corporations can constitute an 'associated in fact' RICO enterprise." PM Pet. 27.[4] Indeed, all ten courts of appeals to have considered the question have held that legal entities like corporations that are associated in fact may form or be part of a RICO enterprise. See *United States* v. *London*, 66 F.3d 1227, 1243-1244 (1st Cir. 1995) (corporation and a sole proprietorship), cert. denied, 517 U.S. 1155 (1996); *Huber*, 603 F.2d at 393-394 (2d Cir.) (corporations and individuals); *United States* v. *Aimone*, 715 F.2d 822, 828 (3d Cir. 1983) (individuals and a corporation), cert. denied, 468 U.S. 1217 (1984); *United States* v. *Thevis*, 665 F.2d 616, 625-626 (5th Cir. 1982) (individuals and corporations), cert. denied, 456 U.S. 1008, 458 U.S. 1109, and 459 U.S. 825 (1982); *Dana Corp.* v. *Blue Cross & Blue Shield Mut.*, 900 F.2d 882, 887 (6th Cir. 1990) (group of corporations); *Masters*, 924 F.2d at 1366 (7th Cir.) (law firm, two police departments, and three individuals); *Atlas Pile Driving Co.* v. *DiCon Fin. Co.*, 886 F.2d 986, 995 & n.7 (8th Cir. 1989) (five legal entities); *United States* v. *Feldman*, 853 F.2d 648, 655-656 (9th Cir. 1988) (individuals and corporations), cert. denied, 489 U.S. 1030 (1989); *United States* v. *Navarro-Ordas*, 770 F.2d 959, 969 n.19 (11th Cir. 1985) (group of corporations), cert. denied, 475 U.S. 1016 (1986); *Perholtz*, 842 F.2d at 352-354 (D.C. Cir.) (group of indi-

[4] Lorillard suggests (Pet. 27) that review is warranted to resolve whether a corporation and its employees can constitute an association-in-fact enterprise. That issue is not presented by the facts of this case and was not addressed by the court of appeals.

viduals, corporations, and partnerships). Those courts have reached that unanimous conclusion without even one judge in dissent. Pet. App. 19a-20a (citing cases). In many other cases—including in an eleventh court of appeals—the courts have similarly upheld RICO claims involving association-in-fact enterprises with members including corporations. *Id.* at 20a-21a.[5] Congress, in turn, has repeatedly amended RICO's definitional section against the background of that strikingly uniform appellate authority without adjusting RICO's definition of "enterprise."[6]

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[5] See, *e.g.*, *United States* v. *Najjar*, 300 F.3d 466, 484-485 (4th Cir.), cert. denied, 537 U.S. 1094 (2002); see also, *e.g.*, *Odom* v. *Microsoft Corp.*, 486 F.3d 541, 547-553 (9th Cir.) (en banc), cert. denied, 552 U.S. 985 (2007); *Living Designs, Inc.* v. *E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005), cert. denied, 547 U.S. 1192 (2006); *United States* v. *Cianci*, 378 F.3d 71, 79-85 (1st Cir. 2004); *United States* v. *Goldin Indus., Inc.*, 219 F.3d 1271, 1275-1277 & n.6 (11th Cir.), cert. denied, 531 U.S. 1015 (2000); *United States* v. *Parise*, 159 F.3d 790, 794-795 (3d Cir. 1998); *United States* v. *Console*, 13 F.3d 641, 652 (3d Cir. 1993), cert. denied, 511 U.S. 1076, and 513 U.S. 1012 (1994); *United States* v. *Blinder*, 10 F.3d 1468, 1473 (9th Cir. 1993); *United States* v. *Butler*, 954 F.2d 114, 120 (2d Cir. 1992); *United States* v. *Stolfi*, 889 F.2d 378, 379-380 (2d Cir. 1989); *Ocean Energy II, Inc.* v. *Alexander & Alexander, Inc.*, 868 F.2d 740, 748-749 (5th Cir. 1989); *Bunker Ramo Corp.* v. *United Bus. Forms, Inc.*, 713 F.2d 1272, 1285 (7th Cir. 1983); *United States* v. *Campanale*, 518 F.2d 352, 357 n.11 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976).

[6] See, *e.g.*, Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 968, 103 Stat. 506 (adding bank fraud as a predicate act); Anticounterfeiting Consumer Protection Act of 1996, Pub. L. No. 104-153, § 3, 110 Stat. 1386 (adding criminal infringement of copyright and trafficking in counterfeit labels for computer programs, movies, and music); Weapons of Mass Destruction Prohibition Improvement Act of 2004, Pub. L. No. 108-458, § 6802(e), 118 Stat. 3767 (adding offenses relating to biological, chemical and nuclear materials).

Petitioners' reliance on the oral argument transcript in *Mohawk Industries, Inc.* v. *Williams*, No. 05-465 (argued Apr. 26, 2006), see, *e.g.*, Lorillard Pet. 11-12, 16-17, simply underscores the absence of authority for their position.[7] The *Mohawk* petitioner argued that corporations cannot be members of an association-in-fact enterprise, even though its petition for a writ of certiorari did not separately raise the issue. At oral argument, Justice Scalia noted that the Court would have been "unlikely to accept cert[iorari]" on that issue if it had been raised, given the unanimous holdings of the courts of appeals. 05-465 Tr. at 6. This Court ultimately dismissed the writ in *Mohawk* as improvidently granted, 547 U.S. 516 (2006), and denied a subsequent petition that expressly presented the question. See *Microsoft Corp.* v. *Odom*, 552 U.S. 985 (2007); Pet. at i, 18-19, *Microsoft*, *supra* (No. 07-138); Br. in Opp. at 2, 11-14, *Microsoft*, *supra*. There is no reason for a different result here.

B. The Court Of Appeals Was Not Required To Undertake Independent Appellate Review Of The District Court's Unchallenged Findings Of Fact Establishing Fraud

Although petitioners expressly disclaimed any challenge to the district court's factual findings on appeal, they now contend that the court of appeals was nonetheless required to undertake "independent appellate review" of the more than 4000 findings of fact made by the

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[7] When the Court decided *Boyle*, it presumably was familiar with the oral argument in *Mohawk*. The petitioner repeatedly cited to the *Mohawk* argument transcript, Pet. Br. at 48 n.37, 53 n.42, *Boyle*, *supra*; Reply Br. at 12-13, *Boyle*, *supra*; and his amici specifically argued that corporations could not constitute an association-in-fact enterprise because Section 1961(4) employs the term "includes" to set out an "exhaustive" list of entities constituting a RICO "enterprise." See Chamber of Commerce Amici Br. at 32-33 & n.5, *Boyle*, *supra*.

district court. See PM Pet. 13-23 (citing *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984)); see also 09-977 Pet. (RJR Pet.) 29; Lorillard Pet. 28-29. The question of the proper standard of review for a party's challenge to factual determinations is not presented when the party makes no such challenges. Moreover, no court has adopted petitioners' view that every factual determination in a fraud case must be subjected to *de novo* review on appeal. Finally, petitioners do not explain how independent review would have made a difference to the outcome here, given the "overwhelming evidence" establishing their fraud. Pet. App. 103a.

1. In *Bose*, the Court held that the "ultimate fact" of "actual malice" in a defamation case is not an ordinary factual finding reviewed only for clear error under Fed. R. Civ. P. 52(a). 466 U.S. at 498 n.15, 499-500. The standard of review for such ultimate facts, the Court explained, "must be faithful to both Rule 52(a) and the rule of independent review applied in *New York Times Co.* v. *Sullivan*, [376 U.S. 254 (1964)]," which held that courts in defamation actions must review the record as a whole to ensure that the judgment does not interfere with free expression. *Bose*, 466 U.S. at 499. The Court emphasized, however, that even in such a case, an appellate court's review of the record must give "'due regard' * * * to the trial judge's opportunity to observe the demeanor of the witnesses," *id.* at 499-500 (quoting Fed. R. Civ. P. 52(a)), and must afford "special deference" to the "trial judge's credibility determinations," *ibid.*

2. Petitioners argue that *Bose* required the court of appeals to review *de novo* the district court's factual findings. *E.g.*, PM Pet. 13-23. Unlike the defendant in *Bose*, however, petitioners did not challenge any of the district court's factual findings as unsupported by the

evidence. Instead, they made a strategic decision to raise only legal claims before the court of appeals. Thus, their joint appellate brief assured the court of appeals that it "need not delve into the district court's lengthy fact-finding." C.A. Joint Br. 22. At oral argument, defense counsel reiterated that petitioners "haven't challenged * * * any fact finding." App., *infra*, 5a (Mr. Estrada). He explained that although petitioners did not "agree with the fact findings of the district court," "we're bringing legal challenges to the court." *Id.* at 7a. It is thus entirely unsurprising that the court of appeals did not discuss the applicability of *Bose* and repeatedly noted that the key factual findings underlying the district court's judgment were unchallenged by petitioners. See, *e.g.*; Pet. App. 53a ("[Petitioners] never challenge the district court's findings documenting the impact of nicotine on the body and, more importantly, [petitioners'] understanding of its effects."); *id.* at 52a (citing the "unchallenged findings" that petitioners acted with "fraudulent intent" in denying the risks of second-hand smoke).[8]

Petitioners cannot credibly challenge the standard of review applied to a claim they did not make. This case would accordingly present a poor vehicle for deciding the relevance of *Bose* to factual findings in a fraud case.

3. Even if petitioners had challenged the district court's factual findings below, there would be no basis for review of their *Bose* claim. Although this Court suggested that an appellate court "could" review a fraud finding independently "[a]s an additional safeguard,"

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[8] Petitioners' opening and reply briefs cited *Bose* in the standard of review sections, see C.A. Joint Br. 20-21 & C.A. Joint Reply Br. 6, but only once elsewhere, and that lone citation was not in connection with a challenge to a factual finding, see C.A. Joint Br. 112-113.

Illinois ex rel. Madigan v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 621 (2003) (*Madigan*), the Court did not suggest that such review is required. In fact, the Fourth Circuit expressly rejected the argument that independent review is required in a fraud case. See *SEC* v. *Pirate Investor LLC*, 580 F.3d 233, 242 (4th Cir. 2009), petition for cert. pending, No. 09-1176 (filed Mar. 26, 2010). Petitioners fail to identify any case in which a court has applied *Bose* in reviewing a finding of fraud under the mail or wire fraud statutes.

The few cases petitioners cite (PM Pet. 14-17) do not involve intentional fraud, but rather constitutional review of broad restrictions on commercial advertising alleged to be potentially misleading. *Ibanez* v. *Florida Department of Business & Professional Regulation*, 512 U.S. 136 (1994), found the Florida Board of Public Accountancy's reprimand of an attorney for (truthfully) including her designation as a certified public accountant on her letterhead to violate the First Amendment. *Id.* at 144. In doing so it did not cite *Bose* or discuss the standard of review.[9]

Similarly, *Peel* v. *Attorney Registration & Disciplinary Commission*, 496 U.S. 91 (1990), found a prophylactic rule prohibiting attorneys from accurately listing specialization credentials in their advertisements to violate the First Amendment. In that setting, the Court was reviewing whether the overall character of the advertising placed it beyond the protections of the First Amendment, see *id.* at 108, not findings of historical fact such as those in a fraud action. As this Court has ex-

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[9] Moreover, it is clear that the Court would have reached the same determination under any standard of review—the Board's argument that the letterhead was misleading was "entirely insubstantial." *Ibanez*, 512 U.S. at 143.

plained, there is a critical constitutional difference between such a "'broad prophylactic rule'" categorically limiting speech and "a properly tailored fraud action targeting fraudulent representations themselves." *Madigan*, 538 U.S. at 619 (alterations omitted); see *Kraft, Inc.* v. *FTC*, 970 F.2d 311, 317-318 (7th Cir. 1992) ("In *Peel*, the issue was whether a prophylactic regulation applicable to all lawyers, completely prohibiting an entire category of potentially misleading commercial speech, passed constitutional muster. * * * Here, by contrast, the issue is whether an individualized FTC cease and desist order, prohibiting a particular set of deceptive ads, passes constitutional muster. * * * Accordingly, we decline to review *de novo* the FTC's findings."), cert. denied, 507 U.S. 909 (1993).[10]

The concerns animating the holding in *Bose* (and subsequent cases assessing claims that certain categories of professional advertising are potentially misleading) do not apply to the factual findings in a fraud case. "The meaning of terms such as 'actual malice'—and, more particularly, 'reckless disregard'— * * * is not readily captured in 'one infallible' definition," and "only through

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[10] *Byrum* v. *Landreth*, 566 F.3d 442 (5th Cir. 2009), likewise involved a constitutional challenge to a state prophylactic rule that "prohibit[ed] significant truthful speech" in interior designers' advertisements. *Id.* at 448; see PM Pet. 16. By contrast, when a case-specific finding of truth or falsity based on assessment of witness credibility is at issue, the Fifth Circuit reviews only for clear error. See *Levine* v. *CMP Publ'ns, Inc.*, 738 F.2d 660, 672 & n.19 (1984) ("Even the *Bose* court recognized that it is important for the reviewing court to respect such choices made by the finder of fact."). *Revo* v. *Disciplinary Bd. of the Sup. Ct.*, 106 F.3d 929 (10th Cir.), cert. denied, 521 U.S. 1121 (1997), and *Falanga* v. *State Bar*, 150 F.3d 1333 (11th Cir. 1998), cert. denied, 526 U.S. 1087 (1999), see PM Pet. 16, also involved challenges to prophylactic rules on attorney advertising.

the course of case-by-case adjudication can [appellate courts] give content to these otherwise elusive constitutional standards." *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 686 (1989). The Court has explained that in the libel setting, it therefore has been "reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law." *Miller* v. *Fenton*, 474 U.S. 104, 114 (1985). By contrast, the elements of fraud, such as falsity and specific intent to deceive, are not "elusive." *Harte-Hanks Communications, Inc.*, 491 U.S. at 686. They are well-established legal concepts that can be readily applied by fact-finders without a need for *de novo* exposition by appellate courts in every single fraud appeal. See *Altria Group, Inc.* v. *Good*, 129 S. Ct. 538, 545 (2008) ("[F]raud claims 'rely only on a single, uniform standard: falsity.'") (citation omitted); *Cherichel* v. *Holder*, 591 F.3d 1002, 1012 (8th Cir. 2010) ("Specific intent is a term of art in American jurisprudence, well known to practitioners and law students alike."), petition for cert. pending, No. 09-1235 (filed Apr. 12, 2010); *United States* v. *Sawyer*, 239 F.3d 31, 40 n.7 (1st Cir. 2001) (same).

4. Finally, petitioners' assertion that "independent appellate review would likely have altered the outcome of th[is] case" (PM Pet. 21) is meritless. It was for good reason that petitioners made no attempt in the court of appeals to challenge the district court's fact-finding. As the court of appeals explained, the district court documented "countless examples of deliberately false statements by [petitioners]," Pet. App. 45a, and the finding of intent to deceive rested on "hundreds" of subsidiary findings, *id.* at 38a; see also Part C, *infra*.

Moreover, the vast majority of the district court's findings establish historical facts—such as the fact that TI's president was warned in writing that "[o]ur basic position in the cigarette controversy is subject to the charge, and may be subject to a finding, that we are making false or misleading statements to promote the sale of cigarettes," Pet. App. 37a (brackets in original)—that would unquestionably be subject to review only for clear error even if *Bose* had some applicability here. See 466 U.S. at 514 n.31. Similarly, even where *Bose* is applicable, "special deference" is due "to the trial judge's opportunity to observe the demeanor of the witnesses." *Id.* at 499-500; see also *id.* at 500 (noting that deference to a trial judge's findings "tends to increase when trial judges have lived with the controversy for weeks or months instead of just a few hours"). Here, the district court found that petitioners had engaged in "a multi-faceted, sophisticated scheme to defraud" (Pet. App. 2009a) after observing the live testimony of 84 witnesses, including many of petitioners' senior executives, over the course of a nine-month trial. *Id.* at 8a.

Petitioners highlight (PM Pet. 21) one sentence in the section of the court of appeals' decision on the likelihood of future violations suggesting that it "may not have reached all of the same conclusions as the district court." Pet. App. 67a; see *id.* at 50a. Such formulaic recitations of the clear-error standard, particularly where the parties have not contested the factual determinations of the district court, do not suggest that the result below would have been different if the panel had conducted "independent" review under *Bose*. Indeed, the immediately preceding sentence in the court of appeals' opinion observes that "examples in the record of [petitioners'] marketing campaigns and internal docu-

ments *amply support* the district court's conclusion that [petitioners] 'continue to make[] false and misleading statements regarding low tar cigarettes in order to reassure smokers and dissuade them from quitting.'" *Id.* at 67a (emphasis added; brackets in original).[11]

C. Petitioners' Fraud Was Not Protected By The First Amendment

Petitioners Reynolds and Lorillard contend (RJR Pet. 5-29; Lorillard Pet. 29-30) that the district court's judgment violates the First Amendment by imposing civil liability for constitutionally protected speech. They contend that their statements to the public in press releases, pamphlets, and television appearances are entitled to First Amendment protection as expressions of opinion "in an ongoing scientific and political debate." RJR Pet. 21; see Lorillard Pet. 29. Petitioners claim protection for their statements made to Congress and

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[11] Philip Morris cites three examples of purported "factual findings" it claims would be reversed under the standard of review it urges. PM Pet. 21; see *id.* at 21-23. First, it cites the district court's finding of specific intent, but it makes a legal argument, *i.e.*, that the court applied the wrong standard. Compare PM Pet. 21-22, with RJR Pet. 23-29 & 09-979 Pet. (Altria Pet.) 7-8. Second, it challenges the finding of fraud in connection with use of "low tar" and "light" descriptors, but, again, this is a legal claim (indeed, one that Reynolds claims is the subject of a circuit split, see RJR Pet. 30-32). Finally, Philip Morris claims the district court erred in concluding there was a "scientific consensus" on the dangers of environmental tobacco smoke and cancer in 1986. PM Pet. 22. As the court of appeals explained, however, this contention is "beside the point." Pet. App. 50a. "The district court based its finding of fraudulent intent not just on the existence of a consensus but also on evidence of [petitioners'] own knowledge" of the dangers of environmental tobacco smoke, and petitioners before the court of appeals "nowhere challenge the accuracy of * * * any of the district court's other findings suggestive of their knowledge" *Id.* at 50a-51a.

federal agencies under the *Noerr-Pennington* doctrine, an antitrust doctrine with underpinnings in the First Amendment's petition clause.

Those contentions lack merit. Although framed in terms of the First Amendment, petitioners' arguments in reality amount to belated factbound challenges to the district court's findings that their statements were fraudulent. Because the district court properly found that petitioners' statements satisfied all the traditional elements of fraud, the First Amendment issues petitioner identifies are not presented here. The court of appeals' decision upholding the district court's view of the evidence establishing fraud does not conflict with any decision of this Court or of another court of appeals. Further review of is therefore unwarranted.

1. "[I]t is well settled that the First Amendment does not protect fraud." Pet. App. 43a-44a (citing *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (the government "may, and does, punish fraud directly"). Petitioners do not contest that bedrock principle. Instead, they assert that the court of appeals failed to apply the traditional requirements of a fraud claim and therefore impermissibly extended the civil fraud statutes. Specifically, petitioners assert that unlike actionable fraud, their public statements were not false, material, or made with specific intent to defraud consumers of money or property. Each assertion is meritless, and none presents a legal question warranting review.

a. *Falsity.* Petitioners argue that their public pronouncements could not form the basis for fraud liability because they were not "false factual statements," but instead were assertions supporting "one side of a scientific debate." RJR Pet. 20 (citation, emphasis, and ellip-

sis omitted). It is unclear whether petitioners are continuing to assert that their statements about cigarettes are not in fact false—that, for example, it remains an open question whether cigarettes cause disease—or instead whether petitioners are asserting that their statements were not deliberately false at the time they were made. Either way, petitioner's contention fails in the face of the district court's extensive factual findings based on evidence that the court of appeals correctly labeled "overwhelming." Pet. App. 39a. As the court of appeals explained, the district court found that petitioners' statements were "clearly and deliberately false," and it provided "countless examples" of such "deliberately false statements." *Id.* at 45a.

The basis for the district court's findings included "decades of evidence that scientists within the [petitioner] corporations and outside scientists hired by the corporations and their joint entities were continually conducting research and reviewing the research of other scientists regarding cigarettes and health, addiction, nicotine and tar manipulation, and secondhand smoke." Pet. App. 35a. "The evidence at trial demonstrated that the results of this research—essential to the core of [petitioners'] operations, including strategic planning, product development, and advertising—were well known, acknowledged, and accepted throughout the corporations." *Ibid.* "These results established that cigarette smoking causes disease, that nicotine is addictive, that light cigarettes do not present lower health risks than regular cigarettes due to smoker compensation, and that secondhand smoke is hazardous to health." *Ibid.*

Trial testimony and internal company documents "demonstrate that [petitioners'] top officials were directly informed of negative research results," Pet. App.

37a, and "that the executives crafted their corporate priorities and strategies in response to these findings." *Id.* at 36a-37a. For example, Dr. William Farone, a Philip Morris scientist for 18 years whom the district court found to be "impressive and credible as both a fact and expert witness," *id.* at 35a-36a (quoting *id.* at 445a), testified that there was "widespread acceptance" at the company "that smoking caused disease," *id.* at 36a, that nicotine is addictive, *id.* at 37a-38a, and that petitioners' "superior knowledge of compensation * * * was closely held within Philip Morris and the tobacco industry." *Id.* at 38a. Indeed, petitioners' own documents support the finding that their statements were false, and deliberately so. TI's Vice President of Public Relations advised its President confidentially: "[O]ur basic position in the cigarette controversy is subject to the charge, and may be subject to a finding, that we are making false or misleading statements to promote the sale of cigarettes." *Id.* at 37a (citation omitted).

Based on specific examples and "hundreds more findings" of fact, the court of appeals concluded that the district court had sufficient evidence from which to conclude that petitioners' "executives, who directed the activities of the [petitioner] corporations and their joint entities, knew about the negative health consequences of smoking, the addictiveness and manipulation of nicotine, the harmfulness of secondhand smoke, and the concept of smoker compensation," and that "[t]hese executives then made, caused to be made, and approved public statements contrary to this knowledge." Pet. App. 38a-39a; see *id.* at 45a (district court provided "countless examples of deliberately false statements by [petitioners]"). Those findings defeat petitioners' efforts to characterize their public statements as good-faith expres-

sions of opinion on a matter of legitimate disagreement. There is no reason for this Court to review both the district court's and the panel's evaluation of the trial record, which included nearly 14,000 exhibits and the testimony of nearly 250 witnesses, *id.* at 8a, especially given that petitioners disclaimed any challenge to the district court's factual findings below, see App., *infra*, 5a, 7a.

b. *Money or property.* Petitioner Reynolds advances the related argument that the statements on which the district court based fraud liability were "not directed to consumers" or aimed at obtaining their money or property, but rather addressed "important public controversies." RJR Pet. 15. This assertion contradicts the district court's factual findings. Reynolds asserts that "[n]either court below disputed that most of the allegedly 'fraudulent' speech was *not* designed to deprive consumers of money or property." RJR Pet. 14-15. That is simply incorrect: The district court specifically found that "the vast majority of [petitioners'] statements were made with the primary purpose of influencing smokers" and "potential smokers," as well as the general public, Pet. App. 1960a, while the court of appeals concluded that all of the racketeering acts on which the district court relied "were intended to defraud consumers," *id.* at 46a.

The premise of Reynolds' disagreement with the courts below is its assertion that any statement other than a "product advertisement" necessarily was not directed at consumers or intended to deprive them of money or property. See RJR Pet. 16 (contending that "98.9% of the 'fraudulent' public statements identified by the district court * * * were not product advertisements," and thus that such statements are "plainly not speech directed at consumers"). But a statement obvi-

ously need not take the form of an advertisement to be targeted at consumers or intended to persuade them to purchase cigarettes. To cite one particularly notable example, the Frank Statement itself was not a "product advertisement," but it was plainly targeted at consumers—indeed, it was entitled "A Frank Statement To Cigarette Smokers"—and the evidence at trial showed that, like petitioners' many other false public statements, the Frank Statement was designed to obtain money or property by persuading smokers to continue purchasing cigarettes. Pet. App. 128a; see, *e.g. id.* at 417a (noting that, according to petitioners' own documents, the open question strategy was intended to "give smokers a psychological crutch and a self-rationale to continue smoking").

c. *Materiality.* Petitioner Reynolds argues (Pet. 18-20) that both courts below erred in deeming its false statements material to consumers. Pet. App. 41a-43a. As with its challenge to the falsity findings, Reynolds' arguments on materiality amount to an attack on the district court's factual determinations and present no question of law warranting this Court's review.

Reynolds asserts that there was "not a scintilla of evidence or any district court finding that any of the challenged statements (excluding 'lights') were 'important to a reasonable person purchasing cigarettes.'" RJR Pet. 18 (quoting Pet. App. 42a). But the district court specifically found that petitioners' false statements were material to consumers, Pet. App. 1986a-1990a, and that petitioners intended the public to rely on their claims. *Id.* at 198a. Those findings of materiality, are neither speculative nor "counterintuitive." RJR Pet. 18. As the panel explained, the matters addressed in petitioners' false statements are important to a reasonable consumer "because each concerns direct and signifi-

cant consequences of smoking." *Id.* at 43a. "When deciding whether to smoke cigarettes, tobacco consumers must resolve initial reservations (or lingering qualms) about the potential for cancer, the risk of addiction, or the hazardous effects of secondhand smoke for friends, family, and others who may be exposed." *Ibid.*

The open question strategy itself shows materiality. That strategy reflected petitioners' recognition that, to meet their objectives, it was necessary only to create enough public uncertainty to reassure smokers that the connection between smoking and disease was an "open controversy," "not a closed case." Pet. App. 1752a (citation omitted). For similar reasons, there is no merit to Reynolds' contention (Pet. 19-20 & n.5) that its false statements could not be material because they contradicted "[t]he overwhelming public knowledge of smoking's health effects." Such contradiction was an integral part of the open question strategy. As Brown and Williamson observed in 1967: "Doubt is our product since it is the best means of competing with the 'body of fact' that exists in the mind of the general public." Pet. App. 456a; see *id.* at 43a ("[Petitioners'] prevarications about each of these issues suggests full awareness of this obvious fact; reasonable purchasers of cigarettes would consider these statements important.").[12]

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[12] Reynolds incorrectly contends that the government was required to prove that identified consumers actually relied on petitioners' misrepresentations. As this Court has explained, "[u]sing the mail to execute or attempt to execute a scheme to defraud is indictable as mail fraud, and hence a predicate act of racketeering under RICO, even if no one relied on any misrepresentation." *Bridge* v. *Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2138 (2008). That is because the mail and wire fraud statutes "punish[] the scheme, not its success." *Pasquantino* v. *United States*, 544 U.S. 349, 371 (2005) (quoting *United States* v. *Pierce*, 224 F.3d 158, 166 (2d Cir. 2000)).

Reynolds is therefore incorrect in contending (RJR Pet. 6-7) that its First Amendment challenge resembles the one at issue in *Nike, Inc.* v. *Kasky*, 539 U.S. 654 (2003). *Nike* involved non-fraudulent, freestanding corporate speech about public policy issues, not, as in this case, an integrated course of conduct designed to deceive and defraud consumers. As the government explained in the portion of its *Nike* amicus brief that Reynolds quotes in its petition (Pet. 6-7), the First Amendment concern in that case arose because the California law at issue permitted private suits challenging speech "that does not injure individuals or materially affect their purchasing decisions." U.S. Amicus Br. at 9, *Nike, supra.* In this case, by contrast, the district court specifically found, and the court of appeals correctly agreed, that petitioners' false statements both injured individuals and materially affected consumers' decisions about whether to purchase cigarettes. The issues in *Nike* therefore are not presented here. As the government noted in *Nike*, suits of this kind—based on "legislation that protect[s] purchasers of goods and services from deception, including fraud"—"are unquestionably compatible with the First Amendment." *Ibid.*

d. *Specific intent to defraud.* Reynolds contends (Pet. 23-28) that the court of appeals erred in upholding the district court's finding that it acted with specific intent to defraud consumers. Pet. App. 32a-41a. To the extent that this argument reflects disagreement with the district court's view of the evidence, it simply repeats the belated challenge to the district court's finding that petitioner's statements were deliberately false and fails for the same reasons. See pp. 35-38, *supra.* In addition to challenging the finding of falsity, however, Reynolds advances two specific arguments about the

manner in which the courts below determined that the specific-intent requirement was satisfied. Those arguments lack merit and do not warrant review.

i. First, Reynolds argues (Pet. 23-26) that the district court rested its specific-intent finding on an incorrect legal standard because, Reynolds contends, the court considered the "collective intent" of the corporation as a whole and did not require that any single employee act with specific intent to defraud. *Id.* at 23-24 (emphasis omitted).[13] That argument is incorrect. Although the district court mentioned a "collective knowledge doctrine," Pet. App. 1980a, the court made clear that a finding of specific intent requires proof that a person with authority to act on behalf of the corporation possessed the requisite wrongful intent or acted with reckless disregard for or willful blindness to the truth. *Id.* at 1981a. Indeed, the district court noted that, in *Saba* v. *Compagnie Nationale Air France*, 78 F.3d 664, 670 n.6 (1996), the D.C. Circuit stated that "the proscribed intent (willfulness) depend[s] on the wrongful intent of specific employees." *Ibid.* The district court also specifically rejected the proposition "that aggregation of different states of minds of various corporate actors is sufficient to demonstrate specific intent in cases where individuals within a corporation make fraudulent statements." *Ibid.*

The district court's analysis is consistent with the court of appeals' articulation of the governing legal principles, which Reynolds does not dispute. As the court of appeals explained, see Pet. App. 32a-34a, "[c]orporations

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[13] Petitioner Altria presents a separate statutory argument premised on a challenge to the legal standard the district court applied in determining whether Altria acted with specific intent to defraud. See Altria Pet. 7-10. That argument is addressed in Part H, *infra*.

may be held liable for specific intent offenses based on the 'knowledge and intent' of their employees." *Id.* at 33a (quoting *New York Cent. & Hudson River R.R.* v. *United States*, 212 U.S. 481, 495 (1909)). "Because a corporation only acts and wills by virtue of its employees, the proscribed corporate intent depends on the wrongful intent of specific employees." *Ibid.* A showing of specific intent does not require that individual officers or employees personally testify to their frame of mind. "A person's state of mind is rarely susceptible of proof by direct evidence, so specific intent to defraud may be, and most often is, inferred from the totality of the circumstances, including indirect and circumstantial evidence." *Ibid.*

Applying these principles, the court of appeals correctly upheld the district court's finding that Reynolds acted with specific intent to defraud. As the panel explained, the district court concluded "that the chief executive officers and other highly placed officials in the [petitioner] corporations made or approved statements they knew to be false or misleading, evincing their specific intent to defraud consumers." Pet. App. 34a. In light of the "overwhelming evidence" that petitioners knew of the toxicity and addictiveness of their products, the district court explained that "it is absurd to believe that the highly-ranked representatives and agents of these corporations and entities had no knowledge that their public statements were false and fraudulent." *Id.* at 1890a; see *id.* at 1984a (noting that, "[i]n the majority of instances, the authors of the fraudulent statements alleged as Racketeering Acts were executives, including

high level scientists—CEOs, Vice Presidents, Heads of Research & Development, not entry level employees.").[14]

Thus, contrary to Reynolds' assertions (Pet. 24-25), the district court did in fact find, properly based on inferences from "overwhelming" evidence, that petitioners' executives knew the information that rendered their public statements false and misleading—in other words, that they acted with specific intent to defraud. The court of appeals therefore correctly held that the "district court did not commit legal error by imputing to [petitioners'] executives knowledge of the falsity of their statements based on inferences reasonably drawn from the facts shown." Pet. App. 35a.

As noted, the district court explicitly disavowed the "collective intent" theory that petitioner attributes to it.

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[14] Petitioner Reynolds challenges the validity of the district court's inference of knowledge on the ground that "most of the alleged 'fraud' was statements by the Tobacco Institute." RJR Pet. 26 (emphases omitted). But even if that were true, Reynolds did not dispute its responsibility for TI's conduct in the court of appeals, and for good reason. As the panel explained, petitioners (including Reynolds) created TI, staffed its board and its committees, and used TI (along with other joint entities) to conduct their "joint public relations through false and misleading press releases and publications." Pet. App. 9a; see also *id.* at 183a (petitioners funded TI's operations with contributions exceeding $600 million). Indeed, the district court found that petitioners formed TI to serve as their collective spokesperson on matters of smoking and health and to provide a confidential forum in which to refine and coordinate their fraudulent scheme. See generally *id.* at 177a-230a. Petitioners structured their operations in this way because, as the TI Executive Committee stressed, it was "of prime importance that the industry maintain a united front and that if one or more companies were to conduct themselves as a matter of self interest, particularly in advertising, obvious vulnerability would be the result." *Id.* at 218a (citation omitted). Petitioners' effort to characterize TI as "a separate entity" (RJR Pet. 26) is thus squarely at odds with the record.

Pet. App. 1981a. But even if it had not, the court of appeals explained that the district court "relied on a permissible view of specific intent," *id.* at 41a, finding that the individuals who made and directed the fraudulent statements in fact knew that those statements were false. See *id.* at 1890a. Because the district court's "conclusions based on the proper standard are sufficient to uphold its judgment," *id.* at 41a, the court of appeals correctly found no need to decide the validity of the "collective intent" theory that petitioners challenge here. Accordingly, the validity of that theory is not presented for this Court's review. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

ii. Second, Reynolds contends Pet. 27-29) that it was deprived of due process because it was denied the opportunity to "show[] that all corporate statements accurately reflected the prevailing internal views—and certainly the speakers' views." RJR Pet. 27, 28-29. The record in the district court belies the assertion that Reynolds was "tricked" into "putting on no defense on a hotly contested issue." *Id.* at 28.

Reynolds had every opportunity and incentive in the nine-month trial in this case to establish, by oral testimony or otherwise, the exceedingly unlikely proposition that its executives believed the public statements made on behalf of the corporation. In their opening statement, petitioners declared that "the evidence will show, Your Honor, these defendants gen[uine]ly believed their positions, advanced legitimate assessments of the science, and made statements with no intent whatsoever to mislead or to defraud anybody." 9/22/04 Tr. 337. The government then presented volumes of evidence establishing petitioners' specific intent to deceive. As the

court of appeals explained, "[t]he government presented evidence indicating that specific high-ranking corporate officials were directly informed" about "the negative health consequences of smoking, the addictiveness and manipulation of nicotine, the harmfulness of secondhand smoke, and the concept of smoker compensation," and that "[t]hese executives then made, caused to be made, and approved public statements contrary to this knowledge." Pet. App. 38a-39a.[15] The central dispute at trial was whether the statements made by petitioners and their employees "accurately reflected" the "prevailing internal views" of the corporation and the speaker. RJR Pet. 28-29. It is simply implausible that Reynolds possessed but deliberately withheld exculpatory evidence that not only would have disproved the showing Reynolds contended the government was required to make but also would have rebutted the specific evidence the government presented. Reynolds' factbound claim of unfairness lacks any merit and does not warrant this Court's review.

2. Petitioners Reynolds and Lorillard contend (RJR Pet. 7-8, 17-18; Lorillard Pet. 29-30) that a subset of their public statements—those directed in the first instance toward Congress or other governmental agencies—enjoy protection under the *Noerr-Pennington*

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[15] Indeed, the government's post-trial brief provided more than 20 pages of "examples of particular executives, employees, and agents of [petitioners] who possessed the specific intent required under the mail and wire fraud laws," with citations to the supporting record evidence. C.A. App. A1393-A1414. Petitioners made no attempt to rebut this evidence in the district court, claiming only that the officers who made or approved petitioners' false statements might have "personally believed" the statements were true despite a wealth of contradictory evidence. *Id.* at A1489 (citing petitioners' joint post-trial brief).

doctrine. The court of appeals correctly rejected that contention, which does not present any legal issue warranting review.

The *Noerr-Pennington* doctrine bears only slight, if any, relevance to this case. Under that doctrine, "[t]hose who petition government for redress are generally immune from antitrust liability." *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56 (1993); see *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961) (*Noerr*); *United Mine Workers of Am.* v. *Pennington*, 381 U.S. 657, 669 (1965). Were this an antitrust case, the *Noerr-Pennington* doctrine might have some conceivable bearing. But as the court of appeals explained, Pet. App. 44a-46a, this case concerns fraud on consumers; petitioners' liability rests on their use of the mails and wires while executing a scheme to defraud cigarette purchasers of their money. 18 U.S.C. 1341, 1343 (Supp. II 2008).[16] This Court has never suggested, and petitioners cite no case holding, that the *Noerr-Pennington* doctrine confers some sort of generalized immunity from laws punishing consumer fraud. See Pet. App. 44a-45a.[17]

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[16] Petitioner Reynolds argues (Pet. 16) that its speech before Congress or other government agencies does not constitute "consumer fraud" because it "was not directed to consumers." But the same statements may be intended both to influence government agencies and to defraud consumers of money or property. The district court's findings make clear that what petitioners describe as their "*Noerr-Pennington* speech" was in fact an integral part of petitioner's overall strategy to portray the health effects of smoking as an "open question" and thereby to obtain money from cigarette smokers by means of false representations.

[17] Petitioners are thus mistaken in claiming (PM Pet. 26 n.4; RJR Pet. 18)) that the decision below conflicts with other circuits' application of

Similarly, while *Noerr-Pennington* immunity stems in part from First Amendment right-to-petition concerns, see *Noerr*, 365 U.S. at 138, this Court has stressed that "[t]he Petition Clause * * * was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble[,] * * * and there is no sound basis for granting greater constitutional protection to statements made in a petition * * * than other First Amendment expressions." *McDonald* v. *Smith*, 472 U.S. 479, 485 (1985); see *id.* at 484 (concluding that "petitions to the President that contain intentional and reckless falsehoods do not enjoy constitutional protection") (internal quotation marks and citation omitted).

Petitioners appear to contend that the *Noerr-Pennington* doctrine confers immunity from all liability for any speech—even knowingly false statements—that is addressed to a government agency and takes the form of "efforts to affect governmental regulation." Lorillard Pet. 29-30; see RJR Pet. 17. But that sweeping proposition cannot be squared with established and unquestionably constitutional prohibitions against making false statements to Congress, federal agencies, and the federal courts. See, *e.g.*, 18 U.S.C. 1001 (prohibiting false statements to the federal government); 18 U.S.C. 1621 (perjury of witnesses); see also *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001) (explaining that federal law "amply empowers the [Food and Drug Administration] to punish and deter fraud against the Administration").

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the *Noerr-Pennington* doctrine. All of the cases on which petitioners rely, like *Noerr* itself, involved immunity from antitrust claims. None involved consumer fraud.

In any event, the scope of the *Noerr-Pennington* doctrine is not squarely presented in this case. As a precautionary measure, the district court excluded evidence of certain testimony petitioners' executives provided to Congress. See Pet. App. 46a; *id.* at 1962a-1963a. Even if those statements were properly excluded, a question the court of appeals found no need to resolve, see *id.* at 46a, the district court specifically found "that the vast majority of [petitioners'] statements were made with the primary purpose of influencing smokers, potential smokers, and the general public and are, therefore, not protected by the *Noerr-Pennington* doctrine." *Id.* at 1960a; see *id.* at 46a (concluding that, even if petitioners' congressional testimony was properly excluded, petitioners' "remaining acts were intended to defraud consumers, so *Noerr-Pennington* protection does not apply"). Indeed, even if the district court had excluded from consideration not just congressional testimony but all of petitioners' statements to the FTC and other federal regulators, the record would still contain ample evidence—including misleading marketing materials, press releases, statements on television talk shows, and advertising campaigns—to support the finding of a scheme to defraud consumers. In view of that record, the question that Reynolds seeks to raise (RJR Pet. 17)—whether First Amendment protection applies to deliberate deception of regulatory bodies and legislators in pursuit of a fraudulent scheme aimed at consumers—is not properly presented.

D. Petitioners' Statements About "Light" And "Low-Tar" Cigarettes Were Fraudulent And Not Authorized By The FTC

Petitioners Reynolds and Philip Morris (RJR Pet. 29-34; PM Pet. 29-30) contend that the court of appeals erred in upholding fraud liability based on their advertising of "light" and "low-tar" cigarettes. That contention is based on two arguments, neither of which has merit or warrants review.

First, petitioners argue that "they should be immune from liability because the [FTC] * * * has blessed their use of labels such as 'light' and 'low tar.'" Pet. App. 46a-47a. But as the court of appeals explained, that argument is "entirely foreclosed" by this Court's decision in *Altria*, which held that "the FTC has in fact never required that cigarette manufacturers disclose tar and nicotine yields, nor has it condoned representations of those yields through the use of 'light' or 'low tar' descriptors." Pet. App. 47a (quoting *Altria*, 129 S. Ct. at 550).

Second, petitioners contend that their "light" and "low tar" descriptors were not actionable under the fraud statutes because although such statements "could be interpreted to imply a health benefit, that is not the only reasonable interpretation that could be drawn from the terms." Lorillard Pet. 30-31; see also RJR Pet. 30. The district court found, however, that petitioners knew and intended that consumers would interpret "light" and "low tar" descriptors to convey a health benefit, see Pet. App. 1068a-1096a, even though petitioners "have known for decades that filtered and low tar cigarettes do not offer a meaningful reduction of risk, and that their marketing which emphasized reductions in tar and nicotine was false and misleading." *Id.* at 46a (quoting *id.* at

1905a-1906a); see *id.* at 1140a-1147a, 1255a-1256a. There is also no merit to petitioners' characterization of "light" and "low tar" descriptors as "simply verbal representations of numerical ratings authorized by the FTC." *Id.* at 49a. That argument "founders on the district court's finding that 'there are lights of certain brands with higher tar levels than regulars of other brands from the same company, and there are also lights and regulars of the same brands that have the same FTC tar rating.'" *Ibid.* (quoting *id.* at 1907a); see *id.* at 1142a (finding that the terms "light" and "low tar," as used by petitioners, are empirically "meaningless" and "arbitrary"). This evidence, "which [petitioners] do not attempt to show is clearly erroneous, reveals the descriptors were not simply representations of numerical ratings and thus were not 'literally true.'" *Id.* at 49a.

In any event, the "fraudulent activity surrounding 'light' cigarettes was not merely limited to the use of misleading descriptors." Pet. App. 48a. The district court found, for example, that petitioners' public statements about the demand for light cigarettes were "blatantly false," *id.* at 1906a; that petitioners "withheld and suppressed their extensive knowledge and understanding of nicotine-driven smoker compensation," *id.* at 1907a; and that petitioners intentionally designed their light cigarettes to facilitate smokers' ability to compensate and thereby obtain the required dosage of nicotine to remain addicted, *id.* at 1905a. See generally *id.* at 775a-850a (describing petitioners' efforts to "design commercial cigarettes that were capable of delivering nicotine across a range of doses that would keep smokers addicted," including through filter design, the placement of ventilation holes, paper porosity, and alterations

to the chemical form of the nicotine delivered to smokers' brains).

E. Neither The Master Settlement Agreement Nor The Passage Of The Family Smoking Prevention And Tobacco Control Act Eliminated All Likelihood Of Future Violations

Both courts below properly found that an injunction was warranted, especially given petitioners' vast, decades-long fraudulent enterprise. Pet. App. 60a-67a, 2007a-2021a; see 18 U.S.C. 1964(a) (injunctions available under RICO to "prevent and restrain violations"). This Court has long recognized that "[i]n exercising its equitable jurisdiction, [a] federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 132 (1969) (internal quotation marks and citation omitted). Petitioners Philip Morris and Lorillard nonetheless contend that the Master Settlement Agreement (MSA) and the FSPTCA "[f]oreclose [f]uture [r]acketeering" and thus "extinguished the district court's jurisdiction." PM Pet. 28; see *id.* at 28-31; Lorillard Pet. 31-32. Petitioners do not contend that the district court's injunction conflicts with any decision of this Court or any court of appeals, and their challenge is without merit.

1. Petitioners erroneously contend that the injunctive relief ordered in this case was barred by the MSA —an agreement between state attorneys general and some tobacco companies settling tort and reimbursement suits through a variety of state-specific injunctions and consent decrees, see Pet. App. 61a-66a, 1864a-1870a. As an initial matter, they cite no authority whatsoever

for the proposition that a racketeer's settlement of other causes of action with other parties can strip a federal district court of "jurisdiction" to provide injunctive relief for the United States in a RICO case. PM Pet. 28; see Pet. App. 62a (characterizing this argument by petitioners as "odd"); cf. *SEC* v. *Management Dynamics, Inc.*, 515 F.2d 801, 807 (2d Cir. 1975) ("[I]njunctive relief is not barred by a defendant's disclaimer of an intent to violate the law in the future."). In any event, this contention ignores the district court's express factual findings regarding petitioners' violations of the MSA, as well as the settlement's inadequacy when compared to the injunction issued here.

As the court of appeals found, petitioners "cannot hide behind the MSA to avoid the imposition of RICO remedies when they do not comply with the agreement." Pet. App. 66a. Those petitioners subject to the MSA "began to evade and at times even violate the MSA's prohibitions almost immediately after signing the agreement." *Id.* at 64a. For example, "although the MSA required [petitioners] to dissolve CIAR, only two days after signing the MSA Lorillard's general counsel wrote to Philip Morris, Reynolds, and Brown & Williamson asking to 'discuss the status of the plan to reinstate CIAR.'" *Ibid.* (citation omitted). "Shortly thereafter, Covington & Burling LLP informed the CIAR contractors '[t]he members of CIAR have decided to create a new organization to continue the work. . . . The members of CIAR that will be members of the new organization intend to continue to fund the research." *Id.* at 64a-65a (citation omitted). "Subsequently, in 2000, Philip Morris initiated a new research program that had the same offices, phone numbers, and board as CIAR and many of the same employees, management, researchers,

peer reviewers, and grantees." *Id.* at 65a; see also *ibid.* ("CIAR is not the lone example of [petitioners'] organizations poised to circumvent the MSA's prohibitions against joint activities or participation in an enterprise.").

Moreover, as further "evidence of the MSA's failures and pitfalls, the district court noted that despite the MSA [petitioners] still fraudulently denied the dangers of secondhand smoke, marketed 'low tar' cigarettes as a healthier alternative to quitting, and falsely denied manipulating nicotine delivery and marketing to youth." Pet. App. 66a; see also *id.* at 1873a-1877a (summarizing additional MSA violations by petitioners); *id.* at 2044a ("[Petitioners] continue to make affirmative statements on smoking and health issues that are fraudulent."). Petitioners offered "no rebuttal" to these factual findings. *Id.* at 66a.

Additionally, the MSA does not include core components of the injunctive relief ordered in this case. See Pet. App. 1884a (MSA does not enjoin against future RICO violations, regulate "'light' and 'low tar'" descriptors, require corrective statements, or fund smoking cessation programs.).

Finally, the States "could not be relied upon to 'vigorously' enforce the MSA," Pet. App. at 66a (citation omitted); some provisions of the MSA had either expired at the time of the district court's order or were on the cusp of expiring, *ibid.*; and BATCo and Altria were not even parties to the MSA, *ibid.*; see *id.* at 1879a. The MSA is no substitute for the injunction ordered in this case, and it certainly did not deprive the district court of "jurisdiction" to enter injunctive relief.

2. Shortly after the panel decision was issued, Congress enacted the FSPTCA, Pub. L. No. 111-31, 123

Stat. 1776. Congress specifically cited the district court's findings in this case in its own legislative findings, see § 2(47)-(49), 123 Stat. 1781, and instructed that "[n]othing" in the new Act "shall be construed to * * * affect any action pending in Federal, State, or tribal court," § 4(a), 123 Stat. 1782. Nonetheless, several petitioners filed a Suggestion Of Mootness And Motion For Partial Vacatur ("Suggestion Of Mootness") in the court of appeals, arguing that the new law rendered aspects of the injunction "moot." The government opposed the motion, explaining that the legislation was not co-extensive with the injunction in this case and arguing that any request to modify the injunction should be presented to the district court in the first instance. The panel denied the Suggestion Of Mootness. See PM Pet. 1. The court of appeals also denied Philip Morris's petition for rehearing en banc, which made a similar argument. See Pet. App. 2183a.

Review of the court of appeals' summary rejection of petitioners' claims regarding the new legislation is not warranted. See PM Pet. 29-31; Lorillard Pet. 31-32. Petitioners can assert their claim that the injunction in this case should be modified in light of the new law in the district court, which is the appropriate forum to consider it in the first instance. See *Horne* v. *Flores*, 129 S. Ct. 2579, 2593 (2009) (party subject to an injunction may seek relief from the district court in light of changed circumstances). In particular, that court is better situated to evaluate petitioners' factual contention that the new legislation renders it unlikely that they "will engage in future joint racketeering activity of the type the district court found and on which it premised its forward-looking injunctive relief." PM Pet. 30. The district court's disposition of such a request would then be

reviewable in the court of appeals and, if necessary, in this Court. Review now is premature.

Allowing the district court to evaluate this contention in the regular course is especially appropriate in light of the fact that petitioners Reynolds and Lorillard, as well as other plaintiffs, have brought a First Amendment challenge to the FSPTCA. See *Commonwealth Brands, Inc.* v. *United States*, 678 F. Supp. 2d 512 (W.D. Ky. 2010), appeal pending, Nos. 10-5234 and 10-5235 (6th Cir. filed Mar. 9, 2010). Petitioners cannot establish that the new law "dispels any doubt" about whether they will engage in future racketeering, PM Pet. 30, while two of them are simultaneously attempting to invalidate the legislation.[18]

Nor is there any merit to Philip Morris's cursory suggestion that the new legislation renders this case moot. PM Pet. 30-31. That very contention was rejected by Congress in the text of the Act itself. § 4(a), 123 Stat. 1782. In an attempt to alter the meaning of this text, Philip Morris points to some of the legislation's provisions that address topics also covered by the injunction, but it does not and cannot claim that the new law wholly duplicates the district court's injunction. For example, the Act does not purport to provide tailored remedies for decades of fraud, such as the corrective statements ordered by the district court. Nor does it provide any redress for the harm to the millions of victims of petitioners' scheme who, as petitioners intended,

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[18] Philip Morris argues in the alternative that this Court should grant, vacate, and remand to allow the court of appeals to consider its argument regarding the impact of the new legislation. PM Pet. 28, 31. But the court of appeals has already considered the impact of the new legislation, denying petitioners' Suggestion Of Mootness and petitions for rehearing en banc, so a GVR would not be appropriate.

continue to purchase cigarettes because they have become chemically dependent on nicotine. See Gov't Pet. at 29-31, *United States* v. *Philip Morris USA, Inc.*, No. 09-978 (filed Dec. 10, 2009).

F. The Court Of Appeals Correctly Upheld The Injunction Prohibiting Specified Conduct And Requiring Corrective Statements

1. The district court enjoined petitioners from "committing any act of racketeering, as defined in 18 U.S.C. § 1961(1), relating in any way to the manufacturing, marketing, promotion, health consequences, or sale of cigarettes in the United States," Pet. App. 2069a, and from "making, or causing to be made in any way, any material false, misleading, or deceptive statement or representation, or engaging in any public relations or marketing endeavor that is disseminated to the United States public and that misrepresents or suppresses information concerning cigarettes," *id.* at 2070a. Petitioners contend that these provisions are too vague to satisfy Fed. R. Civ. P. 65(d). PM Pet. 31-34; Lorillard Pet. 32. That claim, which involves application of settled law to the particular circumstances of this case, does not warrant this Court's review and is meritless in any event.

RICO specifically authorizes district courts to "prohibit[] any person from engaging in the same type of endeavor as the enterprise engaged in," 18 U.S.C. 1964(a), and that is precisely what the district court did in this case. This is not a case in which the district court "enjoin[ed] all future illegal conduct of the defendant" or even all future violations of RICO "however unrelated to the violation found by the court." *Zenith Radio Corp.*, 395 U.S. at 133. Instead, the court exercised its

well-established equitable authority to enjoin petitioners "from committing other related unlawful acts." *Ibid.* In doing so, there was no requirement "that all of the untraveled roads to that end be left open and that only the worn one be closed." *Ibid.* As the district court explained, "Rule 65(d) does not require the [d]istrict [c]ourt to 'predict exactly what [petitioners] will think of next," especially since "it would be impossible to foresee what the ingenuity and creativity of [petitioners'] cadres of sophisticated lawyers could 'think of next.'" *United States* v. *Philip Morris USA, Inc.*, 477 F. Supp. 2d 191, 196 (D.D.C. 2007) (quoting *S.C. Johnson & Son, Inc.* v. *Clorox Co.*, 241 F.3d 232, 240 (2d Cir. 2001)).

The cases that Philip Morris cites (Pet. 32-33) are inapposite. In *Hartford-Empire Co.* v. *United States*, 323 U.S. 386 (1945), this Court held that an order prohibiting acts "as charged in the complaint" was impermissible under Rule 65(d), which bars courts from describing the acts enjoined "by referring to the complaint." *Id.* at 410; see Fed. R. Civ. P. 65(d)(1)(C). In *International Longshoremen's Ass'n* v. *Philadelphia Marine Trade Ass'n*, 389 U.S. 64 (1967), the Court vacated an injunction purporting "to enforce an arbitrator's award" where that award "contain[ed] only an abstract conclusion of law, not an operative command capable of 'enforcement.'" *Id.* at 74. Here, the district court order did not refer to the complaint or direct the "enforcement" of abstract conclusions of law. And it "specified the matters about which [petitioners] are to avoid making false statements or committing racketeering acts: the manufacturing, marketing, promotion, health consequences, and sale of cigarettes, along with related issues that [petitioners] have reason to know are of concern to cigarette consumers." Pet. App. 73a-74a.

The court of appeals concluded that the injunction "sufficiently specif[ied] the activities enjoined as to provide [petitioners] with fair notice of the prohibited conduct," given that the district court "did not abstractly enjoin [petitioners] from violating RICO or making false statements, but instead specified the matters about which [petitioners] are to avoid making false statements or committing racketeering acts." Pet. App. 73a-74a. The court of appeals went on to observe that separate and apart from the clear terms of the injunction itself, "the context of the district court's legal conclusions and 4,088 findings of fact about fraud in the manufacture, promotion, and sale of cigarettes" provided yet more clarity. *Id.* at 74a. Petitioners argue that this observation by the court of appeals "squarely contravene[d] Rule 65(d)" by referring to the findings of fact. PM Pet. 33; see Fed. R. Civ. P. 65(d)(1)(C) ("Every order granting an injunction * * * must * * * describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required."). An appellate opinion cannot "contravene[]" this rule (PM Pet. 33), for it is not an "order granting an injunction," Fed. R. Civ. P. 65(d)(1). The district court's injunction order did not rely on the findings of fact to provide specificity or otherwise violate Rule 65(d).

At bottom, petitioners' objection is not that the injunction is unclear, but that it happens to be broad. But Rule 65(d) limits vague injunctions, not comprehensive ones, and this Court has stressed that broad decrees prohibiting future violations of a statute are "wholly warranted" "where a proclivity for unlawful conduct has been shown." *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949) (concluding that an order "enjoin[ing] any practices which were violations of th[e] statu-

tory provisions" was justified by the defendant's "record of continuing and persistent violations"). That is exactly what the record established here. Pet. App. 74a (citing *McComb*, 336 U.S. at 192).

2. The district court also ordered petitioners to publish corrective statements on their websites, as a one-time full-page advertisement in thirty-five major newspapers, and in ten advertisements on a major television network over the course of one year. Pet. App. 83a. "The court chose these media in order to 'structure a remedy which uses the same vehicles which [petitioners] have themselves historically used to promulgate false smoking and health messages." *Ibid.*; see also *id.* at 2047a-2048a. The district court found such statements appropriate to counteract decades of false and misleading statements by petitioners concerning the health effects of smoking and nicotine addiction, commercial speech that even at the time of the court's order "continue[d] to omit material information or present information in a misleading and incomplete fashion." *Id.* at 2043a; see *id.* at 86a (all such statements were "attempts to persuade the public to purchase cigarettes"). The court of appeals properly concluded that against the background of petitioners' false and fraudulent statements to consumers about their products over 50 years, the publication of appropriate corrective statements addressing petitioners' false assertions in the same media petitioners themselves have used is a suitable means of preventing petitioners from continuing to deceive their customers. *Id.* at 83a-89a.

The court of appeals affirmed this aspect of the district court's order only in the abstract, however, noting that the content of the corrective statements has not yet been determined. See Pet. App. 88a. Indeed, the dis-

trict court said it would determine the content of the corrective statements based on submissions by both the United States and petitioners, *id.* at 2048a-2049a, so petitioners themselves will have an opportunity to shape the statements. Accordingly, review of the corrective statements requirement by this Court at this time, as petitioner Reynolds urges (Pet. 34-36), would be premature.

The court of appeals cautioned the district court that the statements must be "carefully phrased so they do not impermissibly chill protected speech." Pet. App. 88a. "Consequently, the court must confine the statements to 'purely factual and uncontroversial information,' geared towards thwarting prospective efforts by [petitioners] to either directly mislead consumers or capitalize on their prior deceptions by continuing to advertise in a manner that builds on consumers' existing misperceptions." *Ibid.* (quoting *Zauderer* v. *Office of Disciplinary Counsel of Sup. Ct.*, 471 U.S. 626, 651 (1985)). The court of appeals concluded that "*[a]ssuming the corrective advertising once drafted meets these requirements*, it is a permissible restraint on [petitioners'] commercial speech." *Id.* at 89a (emphasis added). This Court could not meaningfully evaluate petitioner Reynolds' claim that the corrective statements will violate the First Amendment and RICO without knowing what the corrective statements are.

Reynolds erroneously contends (Pet. 35) that the court of appeals' affirmance of a corrective statement obligation in the abstract conflicts with *National Commission on Egg Nutrition* v. *FTC*, 570 F.2d 157 (7th Cir. 1977), cert. denied, 439 U.S. 821 (1978). In that deceptive advertising case, the Seventh Circuit modified an FTC order requiring corrective statements on the ex-

press ground that the case did *not* involve "a long history of deception" that had "permeated the consumer mind." *Id.* at 164. That is precisely what the district court found here. See Pet. App. 2047a-2048a. Indeed, the Seventh Circuit contrasted the record before it with the D.C. Circuit's decision in *Warner-Lambert Co.* v. *FTC*, 562 F.2d 749 (1977), cert. denied, 435 U.S. 950 (1978), which sustained a corrective advertising requirement as a remedy for decades of false advertising. See *id.* at 769 (upholding corrective statements because, after fifty years of false claims, "advertising which fails to rebut the prior claims * * * inevitably builds upon those claims; continued advertising continues the deception, albeit implicitly rather than explicitly"). Likewise here, the panel explained, petitioners "violated RICO by making false and fraudulent statements to consumers about their products" for "over fifty years." Pet. App. 88a.

G. The Court Of Appeals Correctly Rejected BATCo's Claim That This Case Involves An Extraterritorial Application Of RICO

BATCo contends that the decision below conflicts with decisions of other courts of appeals holding that RICO does not apply to conduct occurring outside the United States merely because it has "effects" in the United States. 09-980 Pet. (BATCo Pet.) 10. This case, however, does not provide any occasion for resolving the asserted conflict. In addition to engaging in overseas conduct with effects in the United States, BATCo engaged in extensive conduct within the United States, and it also conspired with U.S.-based petitioners. BATCo may therefore be held liable for violations of RICO's substantive and conspiracy provisions without

regard to any foreign conduct, and this case does not involve extraterritorial liability under the test used by any of the courts of appeals. In any event, the cases giving rise to the asserted conflict involved private civil RICO damages actions, in which the plaintiffs were required to show that the defendants' actions had proximately caused their injuries. Those decisions are not relevant to this case, which arises from an action by the United States for equitable relief under Section 1964(a)—a provision that does not impose a proximate-causation requirement.

1. The premise of BATCo's petition is that its liability rests on "wholly foreign conduct." Pet. i; see *id.* at 13 (arguing that "this Court has long treated laws as having extraterritorial reach if they apply to *conduct that occurs in a foreign country*"). That is incorrect. BATCo is liable under RICO's substantive provision because it used the interstate mails and wires—and engaged in other conduct within the United States—in furtherance of a scheme that was aimed at defrauding American consumers. Such an application of RICO presents no issue of extraterritoriality. See *Pasquantino* v. *United States*, 544 U.S. 349, 371 (2005) (application of the wire-fraud statute did not have extraterritorial effect where defendants "used U.S. interstate wires to execute a scheme to defraud a foreign sovereign of tax revenue"); *Environmental Def. Fund, Inc.* v. *Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993) ("Even where the significant effects of the regulated conduct are felt outside U.S. borders, the statute itself does not present a problem of extraterritoriality, so long as the conduct which Congress seeks to regulate occurs largely within the United States."); *Alfadda* v. *Fenn*, 935 F.2d 475, 479-480 (2d Cir.), cert. denied, 502 U.S. 1005 (1991); *Republic of*

the Philippines v. *Marcos*, 862 F.2d 1355, 1358-1359 (9th Cir 1988) (en banc), cert. denied, 490 U.S. 1035 (1989).

This Court has explained that "[m]ail fraud * * * occurs whenever a person, 'having devised or intending to devise any scheme or artifice to defraud,' uses the mail 'for the purpose of executing such scheme or artifice or attempting so to do.'" *Bridge* v. *Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2138 (2008) (quoting 18 U.S.C. 1341). "[T]he indictable act under § 1341 is not the fraudulent misrepresentation, but rather the use of the mails with the purpose of executing or attempting to execute a scheme to defraud." *Id.* at 2140; see *Pasquantino*, 544 U.S. at 355 n.2 (noting that the Court has adopted a parallel construction of the identical language of the wire-fraud statute, 18 U.S.C. 1343). Thus, in *Pasquantino*, this Court rejected the argument that the application of the wire-fraud statute to a scheme to defraud the Government of Canada of liquor-tax revenues gave the statute extraterritorial effect, emphasizing that the defendants in that case "used U.S. interstate wires to execute a scheme to defraud." 544 U.S. at 371. Because the defendants' "offense was complete the moment they executed a scheme inside the United States," the Court explained, the "domestic element of [their] conduct is what the Government is punishing." *Ibid.*

Like the offenses in *Pasquantino*, BATCo's predicate offenses were consummated when it used the United States mails and wires in furtherance of petitioners' fraudulent scheme. See, *e.g.*, Pet. App. 1851a-1852a (describing BATCo's practice of delivering sensitive research reports to petitioners in the United States by sending unmarked envelopes to an attorney in Kentucky); *id.* at 591a-592a (BATCo sent report documenting the phenomenon of nicotine compensation to B&W

in the United States); *id.* at 690a (BATCo sent research on the physiological effects of nicotine to B&W in the United States); see also *id.* at 2145a. Indeed, before trial, BATCo stipulated that it had used the U.S. mails and wires as alleged by the government in eleven separate instances, including mailings to BATCo's United States affiliate B&W. See BATCo Pet. 3 n.3 (describing BATCo's affiliation with B&W); Gov't Exh. 86,700, ¶ 1 (stipulating that the documents identified in Racketeering Acts 11, 30, 50, 51, 53, 54, 57, 60, and 63 were "transmitted via U.S. mails as that term is used in 18 U.S.C. § 1341" and that "[a]ll requirements for mailing pursuant to 18 U.S.C. § 1341 have been satisfied with respect to" those mailings); *id.* ¶¶ 2-3 (similar stipulation for wire-fraud offenses). BATCo's various claims (Pet. 5 n.4) that its mailings were "unpublished," were not "directed at U.S. consumers," and did not "describe[] statements or conduct by BATCo in the United States" are irrelevant under the mail-fraud statute, which prohibits *any* use of the mails in furtherance of a scheme to defraud.. See *Bridge*, 128 S. Ct. at 2138. In light of its stipulations, BATCo cannot now contend (Pet. 31) that its liability rests on "wholly foreign conduct."

Moreover, BATCo's domestic conduct in furtherance of the U.S.-based scheme to defraud extended well beyond its use of the mails and wires: the district court also documented BATCo's direct and extensive participation in petitioners' enterprise in the United States. For example, BATCo was the organizer of a nicotine pharmacology conference for petitioners in South Carolina. Pet. App. 848a-849a. Its representatives attended TI's "College of Tobacco Knowledge" for training in the enterprise's coordinated public-relations messages. *Id.* at 221a-222a. They also attended meetings in

the United States of the joint industry groups that were used to coordinate the affairs of the enterprise. See, *e.g.*, *id.* at 326a-327a (ICOSI meeting in Kansas City, Missouri); *id.* at 332a-333a (INFOTAB meeting in Washington, D.C.). BATCo maintained "frequent and direct" contacts with "high level smoking and health research scientists" at the U.S.-based TI Research Committee and the CTR, including frequent visits to the United States by BATCo scientists and executives. *Id.* at 138a-139a. BATCo operated an experimental tobacco farm in North Carolina for producing tobacco that was genetically engineered to yield extra nicotine. *Id.* at 788a. And BATCo sold millions of cigarettes in the United States through a marketing agreement with a Reynolds subsidiary. *Id.* at 2022a n.83.

In sum, even without the actions taken by BATCo abroad in furtherance of the scheme to defraud United States consumers, there was ample evidence to support BATCo's liability under RICO. Although the court of appeals had no occasion to discuss BATCo's conduct within the United States, the government argued that BATCo's liability could be sustained on that basis, see Gov't C.A. Br. 175-177, and it would provide an alternative ground for affirming the judgment below.

2. In addition to violating RICO's substantive provisions, BATCo also engaged in a RICO conspiracy, in violation of 18 U.S.C. 1962(d). Pet. App. 1991a-2002a. Under RICO, a conspirator is liable for the acts of its co-conspirators undertaken in furtherance of the conspiracy, *Salinas* v. *United States*, 522 U.S. 52, 63-64 (1997), and it is well established that a co-conspirator outside the United States may be held liable for substantive offenses committed in furtherance of a conspiracy by conspirators inside the United States. See, *e.g.*, *Ford* v.

United States, 273 U.S. 593, 619-624 (1927) (defendants whose conspiratorial activity occurred outside the United States were liable for conspiracy to violate United States law because of conduct of other conspirators within the United States); accord *United States* v. *Inco Bank & Trust Corp.*, 845 F.2d 919, 920 (11th Cir. 1988) ("It is well settled that the government has the power to prosecute every member of a conspiracy that takes place in United States territory, even those conspirators who never entered the United States."); *United States* v. *Winter*, 509 F.2d 975, 982 (5th Cir.), cert. denied, 423 U.S. 825 (1975). Since there is no dispute that the conduct of BATCo's co-conspirators occurred in the United States, that principle—which BATCo does not address—provides an independent basis for the decision below.

3. The court of appeals based its decision on the "substantial domestic effects" of BATCo's overseas conduct. Pet. App. 58a. As the court correctly explained, "[b]ecause conduct with substantial domestic effects implicates a state's legitimate interest in protecting its citizens within its borders, Congress's regulation of foreign conduct meeting this 'effects' test is '*not* an *extraterritorial* assertion of jurisdiction.'" *Ibid.* (quoting *Laker Airways Ltd.* v. *Sabena, Belgian World Airlines*, 731 F.2d 909, 923 (D.C. Cir. 1984)).[19] According to

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[19] The evidence amply supported the conclusion that BATCo's foreign conduct was intended to cause, and did cause, substantial effects in the United States. BATCo was a founding member of ICOSI—a joint organization used, in the words of an internal BATCo document, to "throw[] up a smoke screen and to throw doubt on smoking research findings which show smoke causes diseases." Pet. App. 1624a. BATCo also founded or participated in other joint entities and covert "operations" that petitioners used to further the goals of the enterprise in the

BATCo, the court's analysis conflicts with decisions of other courts of appeals that have held that domestic effects of foreign conduct are insufficient to establish RICO liability. For the reasons explained above, this case does not implicate that asserted conflict because BATCo's domestic conduct—and its conspiracy with the domestic cigarette manufacturers—provide independent grounds for liability, and that liability is not extraterritorial under the test used by any court of appeals.

In any event, BATCo's suggestion of a conflict is incorrect. BATCo's argument rests in part (Pet. 12, 20, 30) on several decisions addressing the extraterritorial effect of various statutes other than RICO. As BATCo admits (Pet. 34), however, "RICO is quite different" from those statutes, and therefore those decisions shed little light on whether, or under what circumstances, Congress intended RICO to apply to conduct abroad that has substantial effects in the United States.

As to the few cases that did involve RICO, all of them arose from the very different context of private actions under Section 1964(c), which allows a plaintiff to recover damages caused "by reason of" a RICO violation. The "by reason of" language requires the plaintiff to prove

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United States. See, *e.g.*, *id.* at 1620a ("Operation Berkshire"); *id.* at 1627a (INFOTAB); *id.* at 1634a-1635a ("Operation Downunder"); *id.* at 1660a (International ETS Management Committee); *id.* at 1693a (Association for Research on Indoor Air); *id.* at 1695a-1696a (IAI). BATCo collaborated with other petitioners to craft and enforce a unified message on matters of smoking and health, with a particular eye toward the consequences in the United States. See *id.* at 300a, 302a-303a, 305a, 307a-308a, 311a-315a, 317a, 319a, 343a, 570a-571a, 1620a, 1625a-1626a. Thus, the TI praised INFOTAB, of which BATCo was a founding member, as critical in protecting the industry's position in the United States from the "powerful[]" "back-wash" of anti-smoking developments in other countries. *Id.* at 343a (citation omitted); *id.* at 60a.

that the RICO violation was the proximate cause of injury to the plaintiff's business or property. See *Bridge*, 128 S. Ct. at 2141. In one case cited by BATCo, the Ninth Circuit held that RICO did not reach the defendants' overseas conduct because there was no evidence that it had "'directly caused' loss or injury in the United States" to any of the plaintiffs' businesses or property. *Doe I* v. *Unocal Corp.*, 395 F.3d 932, 961-962 (2002), vacated, 395 F.3d 978 (2003). In another, the Eleventh Circuit held that RICO did not reach the defendant's foreign conduct under the "effects" test because "[n]o United States person or business [was] harmed by this scheme," although the court went on to hold that liability could be based on the "[s]ignificant amounts of conduct" that took place in the United States. *Liquidation Comm'n of Banco Intercontinental* v. *Renta*, 530 F.3d 1339, 1352 (2008).[20]

Unlike the cases cited by BATCo, this case involves a suit by the United States under Section 1964(a) "to prevent and restrain" RICO violations. See 18 U.S.C. 1964(b) (authorizing the Attorney General to bring such proceedings). It does not require that the violation have proximately caused injury, or even that it have caused any injury at all. Moreover, a mail or wire fraud violation may occur whether or not the scheme to defraud succeeded in harming any intended victim. See *Bridge*, 128 S. Ct. at 2137-2141; *Durland* v. *United States*, 161 U.S. 306, 315 (1896). Thus, principles of causation articulated in Section 1964(c) cases are not applicable to

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[20] BATCo also relies (Pet. 17-18) on *North South Finance Corp.* v. *Al-Turki*, 100 F.3d 1046 (2d Cir. 1996), but, as it acknowledges (Pet. 18), the court in that case expressly declined to consider whether a civil RICO damages action may be based on foreign conduct with substantial effects in the United States. See *North S. Fin. Corp.*, 100 F.3d at 1052.

cases arising under Section 1964(a). BATCo does not argue that there is any circuit conflict on the proper standard for the application of RICO in the context of Section 1964(a) to conduct abroad, and in light of the extensive evidence of BATCo's domestic conduct, this case presents no occasion for addressing that issue. Moreover, because the conduct at issue here had "a substantial, direct, and foreseeable effect within the United States," Pet. App. 59a, BATCo has not shown that any other court of appeals would have decided this case differently even under the standards applicable to Section 1964(c).

H. The Court of Appeals Correctly Concluded That Altria Acted With Intent To Defraud

Altria contends that there was insufficient evidence to show that its executives acted with intent to defraud. That fact-intensive question, which was resolved against Altria by both lower courts, see Pet. App. 55a-57a; *id.* at 2005a-2007a, does not warrant this Court's review. In any event, the evidence established that Altria's executives were active participants in the enterprise.

For example, Altria directed and funded CTR "special projects," which were research projects on topics selected by petitioners' lawyers and designed to generate ostensibly independent results that were used to support petitioners' false public statements. Pet. App. 7a; see, *e.g.*, *id.* at 258a (letter from Altria vice-president transmitting check to cover Altria's contribution to CTR special project); *id.* at 356a; see generally *id.* at 9a, 240a-258a. Altria executives participated in meetings of the TI's board of directors and its Executive Committee, which had final approval authority on all TI matters. *Id.* at 183a-184a, 350a. Altria participated on TI's Commit-

tee of Counsel and hosted several meetings of that committee at its corporate headquarters in New York. *Id.* at 210a-211a. Altria organized and hosted petitioners' "Operation Downunder" conference, where petitioners devised their strategy for denying the health risks posed by second-hand smoke. *Id.* at 1629a-1635a. And Altria issued a joint statement on behalf of petitioners denying the addictiveness of nicotine. *Id.* at 634a.

Altria does not address the many findings by the district court demonstrating its active participation in the enterprise. Instead, it contends that there was no proof that its mailings were sent with intent to defraud. 09-979 Pet. (Altria Pet.) 3-7. As the court of appeals explained, this objection misunderstands the governing law. "Nothing in the mail fraud statute requires a mailing to be fraudulent at all, as long as the mailing is in furtherance of a fraudulent scheme." Pet. App. 56a; see *Bridge*, 128 S. Ct. at 2138. In light of the factual findings establishing Altria's participation in the enterprise, the district court did not clearly err in further finding that Altria's executives acted with specific intent to defraud. Pet. App. 57a. Altria joined the scheme to defraud; its executives acted with specific intent in doing so; and Altria's lawyers used the mails to further that scheme.[21] No more was required to establish Altria's liability for mail fraud.

Altria also fails to challenge the district court's additional conclusion that Altria violated RICO's conspiracy

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[21] Although Altria stresses (Pet. 3) that the mailings were all cease-and-desist letters written by in-house counsel, there is no question that they were in furtherance of petitioners' scheme to defraud. Altria sent the letters to suppress publication of data that would have revealed petitioners' intimate internal understanding of the physiological effects of nicotine. See Pet. App. 680a-681a.

provision. See Pet. App. 57a. "The district court's findings of fact regarding Altria's actions in furtherance of the goals of the enterprise[,] * * * as well as the voluminous findings of concerted action and explicit agreement by [petitioners], amply support the circumstantial inference that Altria conspired with the other [petitioners] to violate RICO." *Ibid*; see *Salinas*, 522 U.S. at 66 (finding RICO conspiracy where defendant "knew about and agreed to facilitate the scheme"). Altria's liability for the RICO conspiracy provides an independent basis for subjecting Altria to the remedial order. See *id.* at 63-64 (each member of RICO conspiracy "is responsible for the acts of each other" (citing *Pinkerton* v. *United States*, 328 U.S. 640, 646 (1946)).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2010

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5267

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,
AND TOBACCO-FREE KIDS ACTION FUND, ET AL.,
INTERVENORS

v.

PHILIP MORRIS USA, INC. F/K/A PHILIP MORRIS, INC.,
ET AL., DEFENDANTS-APPELLANTS

Tues. Oct. 14, 2008

APPEARANCES:

ON BEHALF OF THE APPELLANTS:
MICHAEL A. CARVIN, ESQ.
MIGUEL A. ESTRADA, ESQ.

ON BEHALF OF THE APPELLEES:
MARK B. STERN, ESQ. (DOJ)

ON BEHALF OF THE INTERVENORS:
HOWARD C. CRYSTAL, ESQ.

Before: Chief Judge SENTELLE and Circuit Judges TATEL and BROWN

ORAL ARGUMENT OF MIGUEL A. ESTRADA, ESQ.
ON BEHALF OF THE APPELLANT

MR. ESTRADA: Thank you, Your Honor. And may it please the Court. My name is Miguel Estrada. I'm counsel for Philip Morris USA, and I, and I will speak on behalf of all defendants to the lights issue, the future violations issue, and the remedies issue.

Let me start with the lights. The government's position in this case is that it is perfectly lawful for the [26] defendants to tell a consumer that a pack of cigarettes has per cigarette 16 milligrams of tar under the FTC measure, and that another pack has 11 milligrams of tar, but that it is criminal fraud to tell the consumer that 11 is lower than 16. To call this position incomprehensible, as Judge Alito did in the argument last week, doesn't quite do it justice. It is now the case, and it has never been the case, that the use of descriptors is fraudulent or even false because they correctly characterize the outcomes of the FTC-authorized tests since 1966.

Now the government's theory in the case, and which Judge Kessler accepted, is entirely this. This would not be fraud. This would not be false but for compensation. Because of the fact that a consumer may puff more deeply or smoke more cigarettes, this has now become fraud. Now this was—

JUDGE TATEL: Well isn't her, isn't her reason for that that the, that the companies knew that? When, in other words, when they said, when they say that it's a low-tar cigarette, they knew, based on their own research, that in fact it wasn't because of compensatory smoking?

MR. ESTRADA: I did not hear the first part of the question.

JUDGE TATEL: Oh, I'm sorry. Is this better? My question was, didn't the, didn't the District court say that extractly, the phrase low-tar is not inaccurate, but that [27] based on the company's own research about compensatory smoking that they knew that in fact they weren't low-tar because of the way smokers compensate?

MR. ESTRADA: See but—

JUDGE TATEL: That's her theory, right?

MR. ESTRADA: Yes. And that's exactly right.

JUDGE TATEL: Yes.

MR. ESTRADA: At finding, I believe, 2068, she explains that the way consumers compensate is by puffing more deeply on the one hand or smoking more cigarettes.

JUDGE TATEL: Right. And the companies—

JUDGE SENTELLE: (Indiscernible.)

JUDGE TATEL: Yes, and the companies knew that based on their own research.

MR. ESTRADA: Everybody knew it, Judge Tatel. That's, that's the problem.

JUDGE TATEL: Well but the point is, the point is in terms of whether it's fraudulent or not—

MR. ESTRADA: Well but—

JUDGE TATEL: —if the companies knew it—

MR. ESTRADA: --but on that, we can go to the record. I mean, on the one hand, just as a matter of law,

it is unreasonable to say that a consumer could think that, that he would get the prescribed amount solely on the basis of, of smoking more units of the product. And the fact is, in 1966, [28] and this is in the record, when the FTC was conducting hearings on this issue, the companies did tell the FTC that a smoker might be compelled to get his nicotine fix by smoking more, and that's Joint Exhibit 47, 48—

JUDGE TATEL: Right.

MR. ESTRADA: —at page 131. This was known in 1966. Now on whether consumers would puff more deeply, the issue has been sort of speak, ventilated ad nauseam in this courthouse. The *Brown & Williamson* litigation came here in 1983. You may recall that the whole issue in the litigation was compensation. And both the FTC, Judge Cazelle (phonetic sp.) and this Court were fully aware that compensation was going on and that there were two types of it. You could smoke more or take deeper puffs. And the FTC, Judge Cazelle and this Court all said, it is irrelevant because everybody has known from 1966 that the point of the system is to tell the consumer how much tar they would get compared to another cigarette if they smoked the two cigarettes in the same way. It was never from the get-go any sort of a claim, by the agency mind you, that, that this was, that any of these numbers had any bearing on the amount of tar or nicotine that a, that a consumer would get.

JUDGE TATEL: Is there, is there a difference in your, is there a difference between, I, I think your point about low tar. Your point there is that low tar reflects the [29] actual numbers, right? Low tar identifies cigarettes that in fact have low tar, correct?

MR. ESTRADA: Yes.

JUDGE TATEL: But what about, what about the phrases like, like light? And I ask that because of the District court. The District court has this finding. She says, there are lights of certain brands with higher tar levels than regulars of other brands from the same company. And there are also lights and regulars of the same brand that have the same FTC tar rating. Now so what she's saying there is that these, that the labels, light, are being used inconsistently, that they don't always reflect low tar.

MR. ESTRADA: Well I think there—

JUDGE TATEL: Is that, by the way, you don't challenge that fact finding, do it?

MR. ESTRADA: We haven't challenged any fact—

JUDGE TATEL: Right.

MR. ESTRADA: —any fact finding, Judge Tatel.

JUDGE TATEL: Okay. So that, that's a fact finding—

MR. ESTRADA: (Indiscernible) arguments are purely legal.

JUDGE TATEL: Yes.

MR. ESTRADA: The key point about something like lights is that there is, that no consumer gets the same [30] message from hearing, lights.

JUDGE TATEL: No, but in terms of, you were saying that the labels accurately describe—

MR. ESTRADA: But they do, and that's the point—

JUDGE TATEL: —the level. Let me, let me just finish. You say the labels accurately describe the tar level in the cigarettes, but here, you have a finding that that's not the case, that they are inaccurate.

MR. ESTRADA: Well, no. Whether they are accurate or inaccurate I would think is a legal conclusion. But in fact, the finding is—

JUDGE TATEL: Well let me go back. I thought you said they're just, they're, they're just true. They are literally true.

MR. ESTRADA: They are true.

JUDGE TATEL: That's your argument.

MR. ESTRADA: They're literally true. They're actually true.

JUDGE TATEL: But, but here, here you have a finding. Here you have a finding that you haven't challenged which suggests that's not the case.

MR. ESTRADA: Well because what, what is going on with lights as opposed to low tars, that lights are a particular kind of low-tar cigarette. And what lights do accurately describe is that they are, that they have lower tar [31] than the regular pack of the small brand, and also have, have also the meaning that—

JUDGE TATEL: Well actually, that's inconsistent with this finding.

MR. ESTRADA: I don't believe so, because I don't believe she was making any findings as between brands. But in any event, it also conveys a taste message. And of course, look, we have a large, a dispute in the District court on the question of whether, whether the defen-

dants intended a health message or a taste message. Our position is that we intended a taste message. * * *

* * * * *

[118]

ORAL ARGUMENT OF MIGUEL A. ESTRADA, ESQ. ON BEHALF OF THE APPELLANT

MR. ESTRADA: Thank you, Your Honor. I have some quick points.

I don't want to be misquoted as having said that I agree with the fact findings of the district court. What I said is, we're bringing legal challenges to the court. Obviously, we disagree with a lot of what Judge Kessler had to say, and just because she calls something a finding also does not make it a finding. As you know, the Supreme Court said in *Pullman Standard v. Swint*, you have (indiscernible) of law and fact, and if you have made a legal error in your approach to the facts, you know, the judgment may be set aside on that basis.

Frankly, after you get a trial in which 60 years of your conduct out on trial, and an appeal in which even with [119] more pages, you cannot possibly address all of that. It is the only thing that we could do to sort of bring the, the unfairness and the injustice of the whole, of the whole process in front of the court, and to highlight that this is the type of case that was tried purportedly under a federal criminal trial under circumstances that never would have been permitted if it were a criminal trial.

* * * * *

SUPREME COURT, U.S.
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No. 09-1012

IN THE

Supreme Court of the United States

LORILLARD TOBACCO COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA, *ET AL.*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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June 8, 2010

RULE 29.6 DISCLOSURE STATEMENT

The Petitioner, Lorillard Tobacco Company, is a wholly-owned subsidiary of Lorillard, Inc. No publicly held corporation other than Lorillard, Inc. owns 10% or more of Lorillard Tobacco Company's stock.

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REPLY BRIEF FOR PETITIONER

The Government's brief in opposition confirms that the "most important civil RICO action that the Government has ever brought" (05-92 U.S. Pet. 8) rests on an "enterprise" theory that cannot be squared with RICO's language, structure, or purpose. The Government leans heavily on this Court's decision in *Boyle v. United States*, 129 S. Ct. 2237 (2009), but that case involved a *statutorily enumerated* enterprise of *individuals* associated in fact; it did not decide whether *corporations* associated in fact fall within RICO's definition of "enterprise." That question is answered by the statutory text, which expressly includes corporations in the "legal entity" category of enterprise but excludes them from the "associated-in-fact" category. 18 U.S.C. § 1961(4). *See Russello v. United States*, 464 U.S. 16, 23 (1983) (Court presumes that "Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted).

Without acknowledging that it must overcome the *Russello* presumption, the Government invokes *Boyle*'s discussion of the ordinary meaning of "enterprise." Opp. 20. But it is well settled that the Court looks first to the statutory definition of a term; it looks to ordinary meaning only if the statutory text provides no answer to the question. *See, e.g., Dean v. United States*, 129 S. Ct. 1849, 1853 (2009).

The Government emphasizes the uniform body of circuit precedent (Opp. 24-26), but the vast majority of circuit court decisions resolve the issue in a paragraph or footnote, or by merely citing other cases. Not one addresses the presumption that

arises from Congress's disparate inclusion and exclusion of the term "corporations." *See infra* pp. 11-12.

The Government does not dispute that the question is important, and that the most important civil RICO case it has ever brought hinges on the answer. The Court should grant review and correct a flawed body of circuit precedent.

1. This Court has stated repeatedly that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello*, 464 U.S. at 23 (internal quotation marks omitted); *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 63 (2006); *Duncan v. Walker*, 533 U.S. 167, 173 (2001). Here, Congress included *both* "individuals" and "corporations" in the "legal entity" category of "enterprise, but included *only* "individuals" in the "associated-in-fact" category. *See* 18 U.S.C. § 1961(4). If Congress had intended to include corporations and other legal entities in the "associated-in-fact" category, it easily could have done so, either by repeating the list from the first category, or by using the word "persons" instead of "individuals." *See* 18 U.S.C. § 1961(3) ("person includes any individual or entity . . . ").

The Government does not squarely confront the *Russello* canon. Instead, it argues (Opp. 13-20) that the definition of "enterprise" is non-exhaustive because it uses the word "includes" rather than "means," a more restrictive term which Congress used to introduce other RICO definitions. Of course,

the definition of "enterprise" could be non-exhaustive, and yet exclude corporations from the "associated-in-fact" category. The Government resists this conclusion, arguing that *Boyle* established that "the ordinary meaning of enterprise is not restricted by Section 1961(4)'s non-exhaustive enumeration." Opp. 20 (internal quotation marks omitted).

The Government needs to be right on both points; it is wrong on both.

a. *Boyle* did not "expressly h[o]ld" (Opp. 17) that Section 1961(4) is non-exhaustive. *Boyle* addressed the structural features of a type of enterprise that is expressly enumerated in the statute: "a group of individuals associated in fact." The Court thus had no occasion to decide whether the statutory definition of "enterprise" is exhaustive. The Court's suggestion, in a footnote, that Section 1961(4) left open "*the possibility* that the term ['enterprise'] *might* include" non-enumerated entities was *dicta*. 129 S. Ct. at 2243 n.2 (emphases added). The Court's qualified language confirms that it did not definitively resolve whether Section 1961(4) contains an exhaustive enumeration of the entities that may comprise an "enterprise" – much less whether the statutory definition includes a group of corporations associated in fact.

As Lorillard's Petition explains (at 14-17), whether the word "includes" introduces an exhaustive list depends on context, and there are several reasons to conclude that the definition of "enterprise" is exhaustive. The Government responds that the word "includes" typically "'connotes simply an illustrative application of the

general principle.'" Opp. 15-16 (quoting *Federal Land Bank v. Bismark Lumber Co.*, 314 U.S. 95, 100 (1941)). But nothing about Congress's description of the two categories of enterprises suggests that Congress intended to "import[] a general class" of "associated-in-fact" enterprises, *see Helvering v. Morgan's Inc.*, 293 U.S. 121, 126 n.1 (1934), that includes the very entities that Congress listed only in the "legal-entity" category.

Several other definitional provisions in RICO that are introduced by the word "includes" are exhaustive rather than illustrative. *See* Pet. 16. The Government's contention that RICO's definition of "Attorney General" is not exhaustive departs from the position it took in *Mohawk*. *See* Transcript of Oral Argument, *Mohawk Indus., Inc. v. Williams*, No. 05-465 (Apr. 26, 2006), at 49 ("[I]t may well be that the definition of Attorney General is comprehensive in the sense of actually listing all the people who could otherwise plausibly be regarded as standing in the shoes of the Attorney General."). And while the Government faults Petitioner for simply quoting RICO's definitions of "person" and "documentary material," the exhaustiveness of these definitions is apparent. The term "person" "includes *any individual or entity* capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3) (emphasis added). This list is exhaustive because any entity that is *not* capable of holding a legal or beneficial interest in property would *not* fall within the "general class" or "general principle." So too with the definition of "documentary material," which "includes any book, paper, document, record, recording, *or other material*." 18 U.S.C. § 1961(9) (emphasis added). Rather than listing a few items to

illustrate a general principle, Congress covered the field by using the catch-all "other material." Congress's use of the word "includes" thus does not demonstrate that a RICO definition is non-exhaustive.

This Court recently reaffirmed that a definition introduced by the term "includes" can be exhaustive. *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009). The Government correctly notes (Opp. 19) that *Carcieri* interpreted the term "Indian" narrowly based on other provisions of the statute, but the Court's reasoning supports Petitioner's argument. Because Congress expressly extended other provisions in the statute to Indian tribes that were not enumerated in the definition of "Indian," the Court concluded that Congress intended to exclude those tribes from the definition of "Indian," notwithstanding its use of "includes" in the definition. Likewise, in defining "enterprise," Congress indicated its intention to exclude groups of corporations and other legal entities from the "associated-in-fact" category by expressly listing them only in the "legal entity" category.[1]

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[1] The Government's attempt (Opp. 19-20) to distinguish *Carcieri* because the statute at issue, unlike Section 1961, did not use both "includes" and "means" is equally unpersuasive. The statute in *Carcieri* defined some terms by using the word "includes," and others by using the words "shall be construed to refer to" – a phrase no less restrictive than "means." 129 S. Ct. at 1066.

b. Even if the definition of "enterprise" is non-exhaustive, the Government must overcome the *Russello* canon to establish that a group of corporations falls within the "associated-in-fact" category. This Court's recent decision in *Samantar v. Yousuf* is instructive. There, the Court refused to read the definition of "foreign state" to include foreign officials, even though the definition was introduced by the word "includes." 2010 WL 2160785, *6-7 (Jun. 1, 2010). The Court explained that, "even if the list in [28 U.S.C.] § 1603(a) is merely illustrative, it still suggests that 'foreign state' does not encompass officials, because the types of defendants listed are all entities" and because "elsewhere in the [statute] Congress expressly mentioned officials when it wished to count their acts as equivalent to those of the foreign state." *Id.* By the same token, even assuming that the list of enterprises in Section 1961(4) is merely illustrative, it still suggests that an "associated-in-fact" enterprise does not encompass a group of corporations, because an enumerated "associated-in-fact" enterprise is composed of individuals, and Congress expressly mentioned corporations when it wanted to treat them as an enterprise. *See also* Brief for the United States as Amicus Curiae, *Samantar v. Yousuf*, 2010 WL 342031, *18 (No. 08-1555) (arguing that "foreign state" definition introduced by the word "includes" is not "devoid of any limiting principle" and deriving limitation from the statutory enumeration).

In arguing for a different result here, the Government tries to stretch *Boyle* beyond the limits of its reasoning. The Government contends that: (i) a group of corporations acting with a common purpose

qualifies as an "associated-in-fact" enterprise because such an enterprise falls within the ordinary meaning of "enterprise," and (ii) *Boyle* concluded that "the ordinary meaning of enterprise is not restricted by Section 1961(4)'s non-exhaustive enumeration of included enterprises." Opp. 20 (internal quotation marks omitted). Again, the Government is incorrect on both points.

As Petitioner Philip Morris USA demonstrates, a group of competing corporations that affiliate informally to affect government policy does not fall within the ordinary meaning of enterprise. *See* Pet. for Writ of Certiorari, *Philip Morris USA Inc. v. United States of America*, No. 09-976, at 26 (Feb. 19, 2010). Moreover, *Boyle*'s discussion of the ordinary meaning of "enterprise" had nothing to do with whether Section 1961(4)'s enumeration is exhaustive. The defendants there were an *enumerated* "group of individuals associated in fact"; the question was whether that enumerated enterprise also had to exhibit particular structural features. The Court considered the ordinary meaning of "enterprise" solely for the purpose of resolving that question.

Boyle did not suggest, much less hold, that *all* groupings to which the ordinary meaning of "enterprise" might apply are covered, even if they were purposely omitted from the "associated-in-fact" enumeration. Such a result would violate the settled rule that courts will consider the language, structure, and context of a definition before resorting to ordinary meaning. *See, e.g., Dean*, 129 S. Ct. at 1853 ("We start, as always, with the language of the statute.") (internal quotation marks omitted); *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) ("When

a statute includes an explicit definition, we must follow that definition[.]"); *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning.").

The Government cannot alter the analysis by invoking (Opp. 21) RICO's liberal construction principle. This Court has observed that this principle cannot be used to "apply RICO to new purposes that Congress never intended." *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993). The two categories of "enterprise" correspond to RICO's "two aims: . . . to stop organized crime's infiltration of legitimate business [and] . . . to make it unlawful for individuals to function as members of organized criminal groups." Samuel Alito, Jr., *Racketeering Made Simple(r)*, in *The RICO Racket* 1, 3-4 (G. McDowell ed. 1989); *see* Pet. 19.

The Government does not directly address this point, but contends that "Congress had no reason to doubt that corporations . . . would be capable of entering into the sort of dangerous *de facto* alliances that characterize RICO enterprises." Opp. 22. The relevant inquiry, however, is not whether corporations are capable of entering into *de facto* alliances, but whether Congress perceived that pre-RICO conspiracy law was unable to handle such corporate conspiracies, as it had proven unable to handle organized crime conspiracies. And the answer is plainly no.

In contrast to Congress's well-documented concern about the inadequacy of the criminal law as applied to the secret and disparate activity of multiple and shifting individuals associated with

organized crime syndicates, *see, e.g.*, Alito, *supra*, at 4; *United States v. Elliott*, 571 F.2d 880, 902 (5th Cir. 1978), RICO's extensive legislative history contains no indication that Congress viewed the criminal law as inadequate to address joint corporate activity. To the contrary, it largely treated corporations as victims of racketeering enterprises. *See, e.g.*, 116 Cong. Rec. at 602 (1970) (remarks of Sen. Hruska); S. Rep. No. 91-617 (1969) at 76-77 (summarizing legislative findings addressing "infiltration of legitimate businesses"). Congress thus had no reason to extend the concept of "associated-in-fact" enterprises to a group of corporations.

The Government, like the court below, raises the specter that "'racketeers who would otherwise constitute an association-in-fact might evade RICO's grasp by virtue of their ability to operate through corporations and establish complex networks of companies, kickbacks, and contracts to achieve their illicit ends.'" Opp. 22 (quoting Pet. App. 24a). That concern provides no basis for sweeping into the statutory definition of "enterprise" entities that Congress excluded. Moreover, prosecutors and courts can choose from a range of options in such cases, including treating the racketeers operating the shell companies as a group of individuals associated in fact, or using statutes other than RICO to address joint corporate criminal activity.

2. The text and structure of the "enterprise" definition give rise to a strong inference that Congress excluded groups of corporations from the "associated-in-fact" enterprise category. Congress's purpose in enacting RICO reinforces that inference. But even if the Court were not persuaded that the statutory language clearly excludes corporations

from the associated-in-fact category, surely that language does not clearly *include* them. Yet the Government limits to a single paragraph (Opp. 23-24) its response to the argument that established principles of statutory construction, including the doctrine of constitutional avoidance and the rule of lenity, support resolving any ambiguity in Petitioner's favor.

The Government contends (Opp. 23) that Congress used "inclusive" and "capacious" language, but we have explained that the word "includes" does not imply that entities enumerated in category A but not in category B are included – much less clearly included – in category B. The Government also invokes the liberal construction principle, but we have already explained that RICO's "remedial goals" (Opp. 23) did not include combating joint conduct by bona fide corporations.

The Government's final contention is that this Court has "repeatedly rejected similar appeals to narrow RICO's provisions based on the rule of lenity." Opp. 24 (citing cases). But the cases the Government cites all involved arguments for adopting extra-textual *limitations* on RICO's scope. Here, in contrast, Petitioner is not arguing for an extra-textual limitation on RICO's scope. Instead, the Government is advocating an extra-textual *expansion* of RICO's scope by reading Section 1961(4)'s reference to a "group of individuals associated in fact" to encompass a group of corporations associated in fact.

3. The Government argues that this Court should not address the "enterprise" definition "so soon after *Boyle* addressed the term's meaning" and

in the absence of a circuit split. Opp. 24-26. Neither reason is persuasive.

If anything, *Boyle*'s *dicta* make it even less likely that the courts of appeals will revisit the question presented in this case on their own. This Court should not allow *Boyle*'s footnote to stand as the last word on a critical definitional issue under RICO.

Moreover, the absence of a circuit split should not preclude review by this Court where, as here, so many of the court of appeals' decisions contain little or no analysis. *See Dana Corp. v. Blue Cross & Blue Shield Mut. of Northern Ohio*, 900 F.2d 882, 887 (6th Cir. 1990) (no analysis; citation to *United States v. Huber*, 603 F.2d 387 (2d Cir. 1979)); *United States v. Navarro-Ordas*, 770 F.2d 959, 969 (11th Cir. 1985) (same); *United States v. London*, 66 F.3d 1227, 1243-44 (1st Cir. 1995) (no analysis; quotation from *United States v. Perholtz*, 842 F.2d 343 (D.C. Cir. 1988)); *Atlas Pile Driving Co. v. DiCon Financial Co.*, 886 F.2d 986, 995 n.7 (8th Cir. 1989) (footnote); *United States v. Feldman*, 853 F.2d 648, 655-56 (9th Cir. 1988) (one paragraph); *United States v. Thevis*, 665 F.2d 616, 625 (5th Cir. 1982) (same); *United States v. Masters*, 924 F.2d 1362, 1366 (7th Cir. 1991) (same); *United States v. Aimone*, 715 F.2d 822, 827-28 (3d Cir. 1983) (analysis limited; quotation from *United States v. Turkette*, 452 U.S. 576, 580 (1981), that "[t]here is no restriction upon the associations

embraced by the definition").[2] Indeed, *none* of the decisions addresses Petitioner's primary contention based on the disparate inclusion of corporations in one "enterprise" category but not the other.[3]

If there were any doubt about whether review is warranted, it should be resolved in favor of certiorari given that the Government's most important civil RICO case hangs in the balance. This is especially true if the Court chooses to review the remedial question the Government has presented about the availability of disgorgement. This Court should not consider whether a draconian remedy is available to the Government without determining whether the

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[2] *Aimone*'s reliance on *Turkette* is misplaced. The full sentence in *Turkette* reads: "There is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact." 452 U.S. at 580. Moreover, *Turkette* involved an enumerated enterprise (a group of individuals associated in fact); the "restriction" to which *Turkette* refers – whether an association of individuals must have a legitimate purpose – has no basis in the statutory text.

[3] *Huber* and *Perholz* contain the most analysis. The *Huber* court, like the Government here, cited Congress's use of the word "includes," RICO's liberal construction principle, and a concern that excluding groups of corporations would allow racketeers to evade RICO's sanction. 603 F.2d at 393-94. *Perholtz* (mistakenly) relied on *Turkette* and otherwise tracked *Huber*'s analysis. 842 F.2d at 353.

Government's case rests on a mistaken conception of a RICO "enterprise."[4]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[4] Petitioner relies on the reply briefs filed by its co-petitioners to address the remaining issues raised in its petition for certiorari.

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In the Supreme Court of the United States

PHILIP MORRIS USA INC., FKA PHILIP MORRIS, INC.,
PETITIONER,

v.

UNITED STATES, ET AL.,
RESPONDENTS.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents an underlying membership of more than three million companies and professional organizations of all sizes and in all industries.[1] The Chamber advocates issues of vital concern to the nation's business community and has frequently participated as *amicus curiae* before this Court and the federal courts of appeals, including in cases construing the Racketeer Influenced and Corrupt Organizations Act ("RICO") and First Amendment protections for corporate speech. And when misguided decisions of lower courts threaten the interests of the business community and the greater public, the Chamber has supported petitions for this Court's review. This is such a case.

The Chamber recognizes the importance of consistent and disciplined application of RICO to deter and remedy the wrongdoing prohibited by the statute. At the same time, the Chamber is concerned that, in this case and broadly throughout the lower courts, the statute is regularly being misused against legitimate

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amicus* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Counsel of record for all parties have consented to the filing of this brief. Letters of consent from the appropriate counsel who have not previously filed blanket letters of consent have been submitted to the Clerk concurrently with this filing.

businesses. Here, having failed to persuade the courts that the Food and Drug Administration ("FDA") already had the authority to regulate the marketing of tobacco products, and then failed to persuade Congress to provide the FDA that authority, the Clinton administration set out in 1999 to persuade a solitary district court judge to impose the same regulatory scheme by judicial fiat through a nationwide RICO injunction. That gambit should have failed. But at the government's behest, the courts below combined a breathtakingly expansive view of the reach of RICO and a uniquely crabbed view of the First Amendment to justify restrictions on core speech that Congress never intended.

The court of appeals' holding that an entire industry can be labeled a RICO "enterprise" based on corporate competitors' informal coordination on public relations matters exemplifies the lower courts' massive expansion of potential RICO exposure for lawful businesses—converting a statute designed to deter mobsters from victimizing legitimate businesses into a tool for plaintiffs and their lawyers to do the same. This case presents the Court with an appropriate vehicle to stop—and roll back—this unjustified expansion of the RICO statute.

RICO defines an enterprise to include "any individual, partnership, corporation, association, or other legal entity, and *any group of individuals associated in fact although not a legal entity*." 18 U.S.C. § 1961(4) (emphasis added). As the United States has expressly conceded, and the court of appeals impliedly accepted, a corporation is not an "individual" under § 1961(4). The plain text of the statutory definition thus excludes corporations as constituents of

association-in-fact RICO enterprises, and that reading is confirmed by the well-established purpose of the statute.

The courts of appeals nonetheless have uniformly reached the contrary—and profoundly wrong—conclusion on this threshold question of statutory construction. Several members of this Court acknowledged as much when this issue was presented at oral argument in 2007 in *Mohawk Industries, Inc. v. Williams*, No. 05-465. Yet, the courts of appeals will not reconsider this fundamental issue absent this Court's intervention, and some courts are now interpreting this Court's *dicta* in *Boyle v. United States*, 129 S. Ct. 2237, 2243 n.2 (2009), as tacit approval of their position. The Court should seize this opportunity to correct their error.

This case also presents First Amendment issues of great importance to the business community. By imposing RICO liability on corporations for speech made to influence public opinion and affect government policies, this decision threatens to hamstring the ability of American companies to participate freely in public debates on matters critical to their businesses, their employees, and the U.S. economy. And that danger to free expression was exacerbated by the court of appeals' refusal independently to review the record supporting the district court's finding that the speech was knowingly false, and therefore subject to censure. As this Court has repeatedly recognized, the right to free expression is too precious to leave findings of constitutional fact that delineate the boundaries between protected and unprotected speech to the discretion of a single trial judge.

The D.C. Circuit's decision to shelve the presumption against extraterritoriality and apply RICO to the overseas conduct of a foreign company (British American Tobacco (Investments) Limited ("BATCo")) that had no direct or substantial domestic effects is also of great concern to the Chamber and its members. If not corrected by this Court, that holding threatens to bring virtually all foreign business torts within the potential ambit of U.S. law, and the court of appeals' striking disregard for international comity will invite harmful retaliation by other nations against American companies.

Because the D.C. Circuit's decision has far-reaching and disastrous implications for countless businesses, the Chamber and its members have a strong interest in the Court granting plenary review and correcting the erroneous judgment of the court below.[2]

ARGUMENT

I. THIS COURT'S REVIEW IS WARRANTED TO DETERMINE WHETHER A CORPORATION CAN BE A CONSTITUENT OF A RICO ASSOCIATION-IN-FACT ENTERPRISE

The D.C. Circuit's holding that a RICO "enterprise" may comprise corporations associated in

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[2] Although this brief focuses on certain issues critical to the Chamber and its members, the Chamber also supports the other grounds for review advanced by the industry petitioners—Philip Morris USA Inc. fka Philip Morris, Inc., R.J. Reynolds Tobacco Company, et al., Altria Group, Inc., British American Tobacco (Investments) Limited, and Lorillard Tobacco Co.—in their petitions for certiorari.

fact, though consistent with the views of other courts of appeals, conflicts flatly with the plain text and clear purpose of the statute. The lower courts' common error on this threshold issue frustrates the operations of legitimate businesses by exposing them to the threat of industry-wide injunctions, treble damages and unwarranted reputational injury for what amount to allegations of ordinary business torts. This Court should grant review to stop the prosecution of legitimate businesses under the pervasive misinterpretation of a statute enacted to combat gangsters and organized crime.

1. The district court ruled that the industry petitioners violated RICO by participating in the affairs of a joint "enterprise" through acts of wire and mail fraud. Pet. App. 1921a. The court of appeals affirmed. Relying on its prior decision in *United States v. Perholtz*, 842 F.2d 343 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 821 (1988), it held that, because RICO "'defines "enterprise" as *including* the various entities specified,'" the statutory list of qualifying entities "'is not meant to be exhaustive,'" and therefore "a group of individuals, corporations, and partnerships associated in fact can qualify as a RICO 'enterprise,' even though section 1961(4) nowhere expressly mentions this type of association." Pet. App. 18a-19a.

Under that reasoning, whenever corporations work together towards any goal, even informally, they create a RICO enterprise. And whenever a plaintiff can plead an associated pattern of racketeering activity, claims that ordinarily could only have been brought against a constituent corporation as, for example, mail or wire fraud actions, *see* 18 U.S.C. §§ 1341, 1343, are instantly transformed into civil

RICO claims—with the attendant potential for treble damages and attendant stigma, *see* 18 U.S.C. § 1964(c). That outcome "effectively eliminate[s] the enterprise element of RICO and drastically expand[s] federal jurisdiction over all business torts which involve use of the mails or telephones." *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 567 F. Supp. 1146, 1152 (D.N.J. 1983), *aff'd in part, rev'd in part on other grounds*, 742 F.2d 786 (3d Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985). The plain text and clear purpose of the statute confirm that Congress never intended to "RICO-ize" such broad swaths of business conduct.

a. RICO's text makes clear that a corporation cannot be a constituent part of an association-in-fact enterprise. Section 1961(4) describes two distinct categories of associations that may qualify as RICO enterprises. *See United States v. Turkette*, 452 U.S. 576, 581-82 (1981). Although the first clause identifies both "individual[s]" and "corporation[s]" as qualifying legal entities, the second clause specifies only a "union or group of individuals" as an associated-in-fact entity. *See* 18 U.S.C. § 1961(4) (emphasis added). As the United States has conceded, a corporation cannot be a constituent part of a "'union or group of individuals.'" *See* Brief for the United States as *Amicus Curiae* Supporting Respondents at 6, *Mohawk Indus., Inc. v. Williams* (2006) (No. 05-465).

The United States was right to make that concession. As a matter of both common and standard statutory usage "corporations" are not "individuals." *See Webster's Third New International Dictionary of the English Language, Unabridged* 1152 (1971) ("individual" refers to "a single human being as contrasted with a social group or institution"); 1 U.S.C.

§ 1 (listing "corporation" and "individual" as distinct species of "person"); 18 U.S.C. § 1961(3) (defining "person" as "any individual *or* entity capable of holding a legal or beneficial interest in property") (emphasis added). Indeed, this distinction between "individual" and "corporation" is inherent in the definition of a RICO enterprise itself: If the term "individuals" in the definition's second clause encompassed corporations, there would have been no reason separately to identify both "individual" and "corporation" in the first clause. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 21 (2001) (reiterating the "'cardinal principle'" that "'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant'") (citation omitted).

Although some courts of appeals have nonetheless held that a group of corporations can qualify as a "union or group of individuals associated in fact,"[3] the D.C. Circuit did not rest its decision on that plainly erroneous ground. The court reached the same ultimate conclusion, though, based on its view that, because RICO's definition of "enterprise" is introduced by "includes" rather than "means," its enumeration of different types of enterprises is not exhaustive. Pet. App. 26a. But that rationale is also inconsistent with the plain text of the statute.

To be sure, "includes" can be read to introduce either an illustrative or an exclusive list, depending on the statutory context. *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 125-26 (1934). And this Court itself recently observed in *dicta* that Congress's use of "includes"

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[3] *See, e.g., United States v. London*, 66 F.3d 1227, 1243 (1st Cir. 1995) (citing cases), *cert. denied*, 517 U.S. 1155 (1996).

rather than "means" to introduce § 1961(4) indicates that the enumeration of potential enterprises was not intended to be exhaustive. *Boyle*, 129 S. Ct. at 2243 n.2. If that *dicta* were correct, the D.C. Circuit's conclusion that the industry petitioners constituted an association-in-fact enterprise would still be wrong. As Justice Souter suggested during the oral argument in *Mohawk*, Congress's inclusion only of "union[s] or group[s] of individuals associated in fact" in § 1961(4)'s second clause, after having listed "partnerishipf[s], corporation[s], association[s], or other legal entit[ies]" along with "individual[s]" in the first clause, indicates that viewed only individuals—and not corporations or other legal entities that are not natural persons—as potential constituent members of association-in-fact enterprises. Transcript of Oral Argument at 51, *Mohawk Indus., Inc. v. Williams*, (Apr. 26, 2006) (No. 05-465) [hereinafter "Transcript of Oral Argument"] (observing the "peculiarity of [the "enterprise"] definition in which, although it starts out with the word includes, then follows a ... listing, A, B, C, and D, and then it repeats one, but only one, of the items on the list and says groups of these items, *i.e.*, individuals, are included") (statement of Souter, J.). Even if groups of corporations could form an association-in-fact "enterprise," moreover, under the "ordinary meaning of the term"—something this Court did *not* address in *Boyle*, *see* 129 S. Ct. at 2243 n.2—labeling the entire tobacco industry an "enterprise" based on competitors' coordination on public relations efforts would be well beyond the pale.

The result in this case should therefore not turn on whether "includes" is used in § 1961(4) to connote exclusivity rather than illustration. But there is good

reason for the Court nonetheless to take the opportunity here to reexamine the *Boyle dicta*, because the answer to that question will matter in many cases and a full examination of the statutory context demonstrates that Congress intended its enumeration to be exclusive. *First*, unlike typical illustrative provisions in which "includes" introduces a single example or an "obviously" incomplete catalog, *e.g.*, *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 78-79 (2002), in § 1961(4) "includes" precedes a list of five distinct types of legal entity, a catch-all category of "other legal entit[ies]," and lastly a "union or group of individuals associated in fact although not a legal entity." That level of specificity, and the inclusion of a catch-all within the list, indicates that the enumeration is intended to be exhaustive. *See* Transcript of Oral Argument at 42 ("[I]f this is not an exhaustive list, the only thing that seems possibly to be omitted from the list is what's involved here, which is a group consisting of a corporation or other legal [entity] ... and natural persons.") (statement of Alito, J.).

Second, Congress's use of a catch-all category in the first clause of § 1961(4), and omission of a similar catch-all in the second clause, indicates that Congress drafted the second clause as the exhaustive, rather than an illustrative, definition of association-in-fact enterprise. *Cf. Russello v. United States*, 464 U.S. 16, 23 (1983) ("'[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (citation omitted) (alteration in original).

Third, Congress used "includes" to introduce statutory enumerations in three companion subsections of § 1961, *see* 18 U.S.C. §§ 1961(3), (9), (10), and in each of those three subsections "it is unquestionable" that the term introduces an exhaustive list. Transcript of Oral Argument at 48 (statement of Scalia, J.); *see* 18 U.S.C. § 1961(9) ("'documentary material' *includes* any book, paper, document, record, recording, *or other material*") (emphasis added); *id.* § 1961(3) ("'person' *includes* any individual or entity capable of holding a legal or beneficial interest in property") (emphasis added); *id.* § 1961(10) ("'Attorney General' *includes* the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter") (emphasis added). Absent an indication otherwise, it is well established that a word should be given the same meaning throughout a statute. *See, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85-86 (2006).

Fourth, when Congress intended in RICO to introduce a merely illustrative list, it used "including, but not limited to" to make that clear. *See* 18 U.S.C. § 1964(a) (using phrase "including, but not limited to" to introduce an illustrative list of permissible injunctive orders). The absence of the same "but not limited to" phrase in § 1961(4) and the other provisions of § 1961 that use the term "including" to introduce definitional

lists confirms that Congress meant something different in those provisions. *See Russello*, 464 U.S. at 23.

The D.C. Circuit attempted to distinguish the use of "including, but not limited to" in § 1964(a) by suggesting that Congress may have thought it necessary to make express the illustrative nature of the specification in that provision because, unlike § 1961, § 1964(a) lacks the "juxtaposition of the non-exhaustive term 'includes' with the exhaustive term 'means.'" Pet. App. 27a. That rationale is unpersuasive. If "includes" introduced merely illustrative listings in § 1961(4), that connotation surely would carry over to § 1964(a), which is "close enough" to share a common parlance. Transcript of Oral Argument at 43 (statement of Scalia, J.); *see, e.g.*, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995) ("[A] term should be construed, if possible, to give it a consistent meaning throughout the Act.").

In any event, even if an illustrative interpretation were plausible, § 1961(4)'s breadth is "at least ambiguous," Transcript of Oral Argument at 47 (statement of Scalia, J.), and the rule of lenity thus requires the narrowest reasonable construction—that only groups of individuals, not other legal entities such as corporations, may constitute an association-in-fact enterprise. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (rule of lenity applies to statutes with both civil and criminal applications) (citing cases).

b. Reading § 1961(4) that way is also far more consistent with RICO's purposes. The legislative record makes clear that Congress intended through RICO "to seek the eradication of organized crime in the United States" and to counteract organized crime's infiltration and corruption of "legitimate business and

labor unions." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923. Nothing in the legislative history suggests that Congress thought existing legal remedies were insufficient to address tortuous conduct by legitimate corporations, much less that Congress meant to provide the Executive freewheeling authority to regulate-by-injunction industries that are already subject to extensive legislative and administrative oversight or to provide plaintiffs and their lawyers a bludgeon to extract settlements from lawful businesses.

As Justice Alito has explained, RICO had "two aims": "to stop organized crime's infiltration of legitimate business" and "to make it unlawful for individuals to function as members of organized criminal groups." Samuel Alito, Jr., *Racketeering Made Simple(r), in The RICO Racket* 1, 3-4 (Gary L. McDowell ed., 1989); *see also, e.g.*, Transcript of Oral Argument at 44 (statement of Breyer, J.) (noting that Congress may have "put in the word groups of individuals" because it "was worried about organized crime taking over the pizza parlor or taking over a trades union or taking over a similar kind of enterprise"). A plain language construction of § 1961(4) fully suffices to meet these goals.

By defining a RICO enterprise to include any "legal entity," the first clause ensures that the law reaches efforts of organized crime to infiltrate legitimate businesses or use pretextually legitimate businesses to mask criminal activity. And the second clause's specification of a "union or group of individuals associated in fact although not a legal entity" appropriately recognizes that organized crime often acts through a loose confederation or association of

individuals. But nothing in RICO's text, legislative history, or overriding purpose suggests that Congress was also concerned about confederations of *corporations* banding together. Counting informal corporate joint ventures as enterprises "would RICO-ize, with its treble damages and private plaintiffs and everything, vast amounts of ordinary commercial activity .... Congress wouldn't have wanted to [do] that [as that had nothing] to do with organized crime ... [or] with taking over legitimate enterprises [by organized crime]." Transcript of Oral Argument at 44-45 (statement of Breyer, J.). Put another way, Congress "had something significantly different in mind." *Id.* at 36 (statement of Roberts, C.J.). RICO is not—and was never understood to be—necessary to prevent businesses from joining together in illegal activities. Such concerns are fully and adequately addressed by other laws, including statutes prohibiting criminal conspiracy, 18 U.S.C. § 371, and mail and wire fraud, *see* 18 U.S.C. §§ 1341, 1343.

RICO was intended to *protect* legitimate businesses, not to impose new and onerous burdens on them. Its legislative history portrays corporations as victims, not perpetrators, of organized crime. *See, e.g.*, 116 Cong. Rec. 602 (1970) (remarks of Sen. Hruska) (Title IX was "designed to remove the influence of organized crime from legitimate business ... by removing its members from control of legitimate businesses"); S. Rep. No. 91-617, at 1 (1969) ("money and power" of organized crime "are increasingly used to infiltrate and corrupt legitimate business"). It is ironic that this statute, enacted as a shield to protect legitimate businesses from misuse, is being transformed by the lower courts into a weapon for

imposing arbitrary and onerous costs on such businesses.

2. The D.C. Circuit's misconstruction of RICO's "enterprise" definition, if left intact, will continue the long march of the courts of appeals to transform routine allegations of corporate misconduct into treble damages actions under RICO. If this trend continues, RICO will impose increasingly significant and unintended costs on American businesses. And nothing short of this Court's intervention will reverse this trend, particularly as lower courts are now interpreting this Court's *dicta* in *Boyle* as tacit approval of the status quo. If review is not granted, the government will be further emboldened to pursue regulation-by-injunction without the "hassle" of seeking congressional approval, and plaintiffs and their attorneys will be further emboldened to hound American businesses, even when those businesses are engaged in standard and lawful practices.

The ongoing "RICO-ization" of ordinary business torts imposes enormous costs on the national economy, even aside from its use here as a tool for imposing massive, unauthorized nationwide regulation. A RICO civil action in the hands of plaintiffs' lawyers is an "unusually potent weapon—the litigation equivalent of a thermonuclear device." *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991). In addition to potentially ruinous treble damages and the government's thus-far-unsuccessful efforts to secure massive retrospective disgorgement, businesses experience "an almost inevitable stigmatizing effect" when sued under a statute associated with racketeers and mobsters. *Figueroa Ruiz v. Alegria*, 896 F.2d 645, 650 (1st Cir. 1990). Unsurprisingly these attributes

have made RICO a popular litigation tool of the plaintiffs' bar.[4] "Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat." *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 506 (1985) (Marshall, J. dissenting). Designed to deter and root out organized crime, RICO's expanding scope now facilitates strike suits by plaintiffs and their lawyers to extract settlements from legitimate businesses.

In the Chambers' and its members' experience, the vast majority of civil RICO cases filed against corporations under the lower courts' misguided conception of a RICO "enterprise" have involved ordinary business torts. These suits do nothing to promote Congress's goals, and instead "apply RICO to new purposes that Congress never intended." *See Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993). Yet because the courts of appeals have uniformly come out the wrong way on this issue, the abuse of the RICO statute against legitimate businesses will persist until the Court intervenes.

The Court should correct this fundamental error now. Several Members of the Court recognized the importance of this issue in 2007 during the oral

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[4] According to the Administrative Office of the U.S. Courts, 749 civil RICO actions were filed in federal court in the year ending March 31, 2009 alone. *See Federal Judicial Caseload Statistics*, Table C-2 (U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending March 31, 2008 and 2009), *available at* http://www.uscourts.gov/caseload2009/tables/C02Mar09.pdf) (last visited Mar. 13, 2010).

argument in *Mohawk*, and this case presents the issue squarely. Given the enormous risks involved in defending RICO actions, moreover, most of these cases—including those involving meritless claims—settle. This case therefore presents the Court with a rare vehicle to resolve this vitally important issue.[5] The Chamber urges this Court to grant certiorari and restore the definition of a RICO association-in-fact enterprise to the one that Congress provided: a "group of *individuals* associated in fact although not a legal entity." *See* 18 U.S.C. § 1961(4) (emphasis added).

II. THIS COURT'S REVIEW IS WARRANTED TO DETERMINE WHETHER A RICO ACTION MAY CONSTITUTIONALLY BE BASED ON STATEMENTS MADE TO INFLUENCE PUBLIC OPINION AND AFFECT GOVERNMENT POLICY

The D.C. Circuit stretched RICO far beyond its breaking point, and beyond the statute's constitutional scope, when it decided that the defendants could be held liable for statements overwhelmingly made to influence public sentiment and affect legislative and enforcement policy. Pet. App. 43a-46a. Indeed, "98.9% of the 'fraudulent' public statements identified by the district court"—addressing the health effects of smoking and secondhand smoke, the addictive nature of nicotine, and alleged manipulation of nicotine levels—"were not product advertisements, but op-ed

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[5] Notably, resolution of this issue would also resolve the deep circuit split over whether a corporation and its agents can constitute an enterprise distinct from the corporation itself. *See* Brief of Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Petitioner at 2-3, 18-19, *Mohawk Indus., Inc. v. Williams* (2007) (No. 06-873).

pieces, congressional testimony, and the like." Reynolds Pet. 16. Yet, the court of appeals held that *Noerr-Pennington* does not apply, and RICO and underlying federal anti-fraud statutes do apply, because the district court found the statements "clearly and deliberately false." Pet. App. 44a-45a. That holding is flatly inconsistent with the decisions of this Court and other courts of appeals, and if not reversed will substantially hinder the business community's ability to participate freely in public debate on matters central to the welfare of those businesses, their employees, and the U.S. economy.

Contrary to the D.C. Circuit's understanding, *Noerr-Pennington* applies foursquare to *all* speech made to influence public opinion towards the enactment or enforcement of law, regardless of whether the speech is true, false, or fraudulent. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, itself involved a third-party publicity campaign by railroads to advance legislation adverse to the trucking industry by use of "'deception of the public, manufacture of bogus sources of reference, [and] distortion of public sources of information.'" 365 U.S. 127, 140 (1961) (quoting district court) (alteration in original). This Court nonetheless held that the railroads could not be held liable under the Sherman Act without infringing their constitutional right to petition the government. *Id.* at 137-41; *see also Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499-500 (1988) ("A publicity campaign directed at the general public, seeking legislation or executive action, enjoys [statutory] immunity, even when the campaign employs unethical and deceptive methods.").

Other courts of appeals have likewise recognized that speech to influence public opinion and government policy is an essential feature of our political landscape, and that the truth or falsity (or even fraudulent nature) of statements made in that context are fodder for political combat, not suits at law. *See, e.g., Davric Me. Corp. v. Rancourt*, 216 F.3d 143, 147 (1st Cir. 2000) ("Even *false* statements presented to support [petitions to the government] are protected."); *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886, 894 (9th Cir. 1988) ("While we do not condone misrepresentations, we trust that the council and agency, acting in the political sphere, can 'accommodate false statements and reveal their falsity.'") (citation omitted), *cert. denied*, 488 U.S. 965 (1988). Until now, the D.C. Circuit never suggested otherwise. Although the court cited its prior decision in *Whelan v. Abell*, 48 F.3d 1247 (D.C. Cir. 1995), *see* Pet. App. 44a, *Abell* involved the government's historical ability to punish false statements made in adjudications and expressly distinguished *Noerr-Pennington* speech. *See* 48 F.3d at 1255 ("'Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.'") (citation omitted).

Review of this aspect of the court of appeals' decision is well warranted. Liability under RICO should not lie for views expressed in the course of and to affect public debate and government policy, such as industry petitioners' opinions about the then-uncertain health effects of secondhand smoke or arguments about semantic differences between "addiction" and "dependence." The expansion of RICO from the marketplace into the marketplace of ideas will chill businesses from participating fully in important public

debates, and cede the field to anti-business lobbies. Congress never so intended. As this Court recognized with respect to the Sherman Act, so too with RICO: "The proscriptions of the Act ... are not at all appropriate for application in the political arena." *Noerr*, 365 U.S. at 141.

III. THIS COURT'S REVIEW IS WARRANTED TO DETERMINE WHETHER INDEPENDENT APPELLATE REVIEW IS REQUIRED OF CONSTITUTIONAL FACTS THAT DISTINGUISH PROTECTED FROM UNPROTECTED SPEECH

The D.C. Circuit's holding that the First Amendment does not protect core political speech if it is "deliberately false [and] misleading," Pet. App. 44a, put dispositive constitutional weight on the district court's factual finding that the defendants' statements were "clearly and deliberately false," Pet. App. 45a (citing *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 146, 208-09, 309, 860, 864 (D.D.C. 2006)). Under *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485 (1984), the First Amendment rights at stake demanded independent appellate review of that crucial finding. Yet, even though the court of appeals acknowledged that it "may not have reached all the same conclusions as the district court," it reviewed the district court's findings "under the highly deferential clearly erroneous standard." Pet. App. 67a. That reinforced a persistent circuit conflict over the necessity for independent appellate review of constitutional facts. The issue is squarely presented in this case and it manifestly warrants this Court's attention.

In *Bose*, this Court addressed the appropriate standard of review of the finding of "actual malice" in a product disparagement case. The Court observed that in libel, fighting words, obscenity, and child pornography cases, it had "regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits." 466 U.S. at 504-05; *see also id.* at 505-10 (discussing prior cases). The Court explained that independent appellate review was necessary because "[p]roviding triers of fact with a general description of the type of communications whose content is unworthy of protection has not, in and of itself, served sufficiently ... to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas." *Id.* at 505. It concluded that "[t]he requirement of independent appellate review ... is a rule of federal constitutional law." *Id.* at 510.

Since *Bose*, this Court has consistently adhered to that rule, including in cases involving commercial speech. In each case it has independently reviewed the facts critical to the determination whether the challenged speech is constitutionally protected. *See* Philip Morris Pet. 14-16. The Fifth, Tenth and Eleventh Circuits have followed suit. *See id.* at 16. Despite the clarity and consistency of this Court's direction, however, the D.C. Circuit believes "the implications of *Bose* are far from clear," *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 42 n.3 (D.C. Cir. 1985), and, along with the Fourth Circuit, it has refused independently to review constitutional facts that separate protected from unprotected commercial

speech. *See* Philip Morris Pet. 17. In this case, the D.C. Circuit, without discussion, extended that approach to noncommercial speech and reviewed the district court's finding that industry petitioners' speech was fraudulent, and thus unworthy of constitutional protection, only for clear error.

In *Bose*, this Court concluded that independent appellate review of constitutional facts is required in the First Amendment context because the "stakes" of free speech are simply "too great to entrust them finally to the judgment of the trier of fact." 466 U.S. at 501 n.17. This case exemplifies the danger of ignoring that teaching. Absent independent appellate review, a single judge's belief that industry petitioners crossed the line of permissible public advocacy will deprive their speech of all constitutional protection and permit sweeping restrictions on their rights to communicate freely on matters of public concern. This Court's intervention is necessary to prevent that from happening in this and future cases.

IV. THIS COURT'S REVIEW IS WARRANTED TO DETERMINE WHETHER RICO APPLIES TO EXTRATERRITORIAL CONDUCT OF FOREIGN CORPORATIONS THAT HAS NO DIRECT OR SUBSTANTIAL EFFECTS IN THE UNITED STATES

The D.C. Circuit's affirmance of the RICO judgment against BATCo also warrants this Court's review, on several grounds.

First, the D.C. Circuit refused to apply the established presumption against extraterritoriality. In direct conflict with this Court's decisions and those of other courts of appeals, *see* BATCo Pet. 12-13, the D.C. Circuit hewed to its idiosyncratic view that

"Congress's regulation of foreign conduct [with substantial domestic effects] is '*not* an *extraterritorial* assertion of jurisdiction.'" Pet. App. 58a (citation omitted). Thus, in the D.C. Circuit, the normal presumption is reversed: All federal laws apply to foreign conduct unless Congress expressly provides otherwise. Although other federal courts have taken differing views on *how* the presumption against extraterritoriality should be applied—a situation that itself warrants this Court's attention—the D.C. Circuit's view that the presumption effectively does not exist is flatly at odds with all of them, and irreconcilable with this Court's precedent, Congress's understanding, and traditional norms of international comity. *See* William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 Berkeley J. Int'l L. 85, 88 (1998).

Second, when the D.C. Circuit considered whether RICO applies to the particular foreign conduct the district court found here, it adopted the effects test from the antitrust and securities contexts without any consideration whether that test captures what Congress actually had in mind in RICO. This Court did not formulate the effects test as a one-size-fits-all framework to determine the extraterritorial limits of all domestic laws, but instead determined that this test best effectuated Congress's specific intent under federal antitrust and securities laws. *See North South Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1052 (2d Cir. 1996).

Third, in affirming the district court's judgment against BATCo, the D.C. Circuit so diluted the effects test that it will routinely permit prosecution under RICO (and other federal laws) of wholly foreign conduct. Although the court recited that foreign

conduct must have "a substantial, direct, and foreseeable effect within the United States," Pet. App. 59a, it held sufficient foreign conduct with *at most* indirect and slight effects in this country. The district court did not find that BATCo made fraudulent statements to any U.S. consumer. The D.C. Circuit nonetheless affirmed BATCo's RICO liability based on (1) BATCo's provision to its U.S. subsidiary of "sensitive nicotine research" conducted abroad, which the U.S. subsidiary never shared with anyone else; (2) BATCo's "found[ation], fund[ing], and active[] participat[ion] in various *international* organizations, which [other] Defendants ... saw as instrumental to *their* efforts" in the U.S.; and (3) "the tremendous domestic effects of the fraud scheme generally." Pet App. 59a-60a (emphasis added). If those attenuated effects justify the application of RICO to overseas conduct, foreign business torts will regularly be within the ambit of U.S. law—at least so long as suit is brought within the D.C. Circuit.

Beyond their obvious importance to foreign actors and international comity, these issues are also vitally important to American business. If not corrected, the D.C. Circuit's unwarranted expansion of RICO's territorial scope will invite retaliation by other nations, to the detriment of U.S. businesses and the U.S. economy. *See* Austen Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 Vand. L. Rev. 1455, 1490-91 (2008). American companies' foreign operations will also suffer if they are forced to contend with inconsistent and overlapping regulation by U.S. authorities and the controlling law of their host jurisdictions. Certiorari is warranted to prevent that from happening.

CONCLUSION

The industry petitioners' petitions for *certiorari* should be granted, and the judgment should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

PHILIP MORRIS USA, INC. ET AL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF WASHINGTON LEGAL FOUNDATION AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF has devoted substantial resources to litigating constitutional and statutory cases over the last 30 years in support of the free enterprise system and in opposition to unlawful and excessive government regulation of business due to the detrimental effects such actions have on American businesses, workers, and consumers, as well as the economy as a whole. In particular, WLF has appeared as amicus curiae before this Court and lower federal courts (including the circuit and district courts in this case) in cases raising important constitutional issues—including First Amendment cases—and statutory questions.

The National Association of Manufacturers (the NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, amici state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than amici and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days prior to the due date, counsel for amici provided counsel for all parties with notice of intent to file. Consent to file was granted; letters of consent have been lodged with the Court.

public about the vital role of manufacturing to America's economic future and living standards.

REASONS FOR GRANTING THE PETITION

The United States wanted to hold the tobacco industry accountable for what the government came to see as statements at odds with the emerging "consensus" on the health and safety of smoking. Having failed to legislate or regulate a basis for such accountability, the government decided to litigate.

To that end, it constructed an unprecedented civil fraud case against the tobacco industry predicated on a novel use of the Racketeer Influenced and Corrupt Organizations ("RICO") Act. It used the federal fraud statutes to target the speech of industry members made during decades-long public debates over the health and safety of smoking by treating these members' statements and activities as a collective enterprise. In the process, the government trampled the First Amendment protections built into the fraud statutes, chiefly, the scienter and materiality requirements. The government never attempted to prove that any speaker had a specific fraudulent intent nor that the speech at issue was material to consumers. Yet, the district court endorsed the government's novel approach. *See United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006). And the Court of Appeals affirmed, compounding the district court's error by failing to "independently review the trial court's findings," thereby eliminating a key "additional safeguard responsive to First Amendment concerns." *Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 621 (2003) (citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 498-511 (1984)).

Amici write separately to explain how the legal and doctrinal shortcuts taken here have broad implications for free speech. Indeed, if allowed to stand, this case threatens to chill vast amounts of speech by myriad participants in debate on issues of public concern, depriving particular speakers of their First Amendment rights and diminishing the diversity, intensity, and maybe even the accuracy of public discourse.

At bottom, this case concerns the extent to which the speech of corporate speakers is entitled to full First Amendment protection. The Court granted certiorari in *Nike v. Kasky*, 539 U.S. 654 (2003), in order to address this very issue. Its dismissal of that case has left important doctrinal questions unanswered and has fostered uncertainty about the First Amendment protection afforded to an entire class of speakers. The present case affords the Court the opportunity to complete its unfinished business in *Nike*. It also provides this Court a vehicle to resolve a circuit split about and reaffirm the constitutional necessity of independent review of fact-finding in fraud cases, which review is vital to protect the First Amendment. The Court should grant the petitions and provide clarity on these important questions.

I. THE D.C. CIRCUIT'S FLAWED APPROACH TO THE FIRST AMENDMENT WARRANTS THIS COURT'S REVIEW

Though the D.C. Circuit's opinion virtually ignores the First Amendment, this case centers on speech that is entitled to full First Amendment

protection. Public statements made about the health and safety effects of smoking made in newspaper articles, op-ed pieces, congressional testimony, press releases, and television appearances constitute speech on matters of public concern. *See* R.J. Reynolds Pet. at 16. Yet, the Court of Appeals treated this speech as commercial speech, affording it diminished—and ultimately no—First Amendment protection because it determined the speech to be fraudulent. Worse, in concluding that the speech at issue was fraudulent, the Court of Appeals allowed the government to evade the scienter and materiality requirements, which are essential for fraud statutes to accommodate the First Amendment.

A. Much of the Speech at Issue is Entitled to Full First Amendment Protection

The debate over cigarettes' health and safety "is one of the most controversial issues of our time. And, because the debate encompasses serious health concerns, it undoubtedly is one of the most important issues." Jef I. Richards, *Politicizing Cigarette Advertising*, 45 CATH. U. L. REV. 1147, 1185 (1996). Indeed, "the addictive nature of cigarettes/nicotine, its health consequences and resulting public costs" are "matters of public concern." *Hoover v. Morales*, 164 F.3d 221, 225 (5th Cir. 1998); *see also Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). Even the district court described this debate as a "national issue[] with . . . enormous economic, public health, commercial, and social ramifications." *Philip Morris USA, Inc.*, 449 F.Supp.2d at 31 n.3. Participating in this debate thus is one of the "classic forms of speech that lie at the heart of the First Amendment."

Schenck v. Pro-Choice Network of Western N.Y., 519 U.S. 357, 377 (1997). Accordingly, speech on either side is entitled to full First Amendment protection. *Connick v. Myers*, 461 U.S. 138, 145 (1983) ("[S]peech on public issues occupies the highest rung of the heirarchy of First Amendment values, and is entitled to special protection." (internal quotation marks omitted)).

The particular modes of speech principally at issue—newspaper articles, op-eds, congressional testimony, press releases, and television appearances, largely responding to public criticism and proposed government regulation—also are traditionally protected. *See* R.J. Reynolds Pet. at 16; *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (finding a paid editorial advertisement fully protected speech because it "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on . . . matters of the highest public interest and concern").

The Court of Appeals ignored the nature of this speech as fully protected, seemingly because the speakers had an economic motive for their communications.[2] But economic motive is insufficient

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[2] Although the Court of Appeals did not explicitly label the speech "commercial," it is clear the court treated it as such, because it rejected the Petitioners' First Amendment arguments solely on the grounds that the speech was (in the court's view) fraudulent. First Amendment jurisprudence makes clear that this is a sufficient ground to punish commercial speech, *see Madigan*, 538 U.S. at 612 ("[T]he First Amendment does not shield fraud."), but not fully protected speech, which—even if false—is entitled to "breathing space" to

to transform fully protected speech into commercial speech. *See Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 899 (2010) ("First Amendment protection extends to corporations."); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67 (1983) ("[T]he fact that Youngs has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech.").

The D.C. Circuit failed to address and carefully review the First Amendment implications of the speech on which RICO liability was predicated. In so doing, it blurred the distinction between commercial speech and speech on matters of public concern, and undermined the protections of the First Amendment.

B. The Decision Below Eliminates the Constraining Features that Allow Fraud Statutes to Co-Exist with the First Amendment

Because fraud statutes implicate constitutionally protected speech, this Court has placed "limits on the policing of fraud when it cuts too far into other protected speech." *United States v. Williams*, 128 S. Ct. 1830, 1851 n.2 (2008) (Souter, J., dissenting); *see, e.g., Madigan*, 538 U.S. at 620; *see also* Brief for United States as *Amicus Curiae* Supporting

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ensure the vindication of First Amendment rights. *See New York Times Co.*, 376 U.S. at 271-72 (noting that erroneous statements "must be protected if the freedoms of expression are to have the 'breathing space' that they need to survive" (internal quotation and alteration omitted)).

Petitioners at 20, *Nike*, 539 U.S. 654 (2003) ("U.S. *Nike* Brief") (highlighting "the constraining features that have traditionally served to prevent any conflicts from arising between the First Amendment and laws that prohibit fraud"). Here, however, the government and lower courts disregarded these safeguards, principally the requirements of specific fraudulent intent and materiality.

To prove specific intent, a court must "look to the state of mind of the individual corporate officers and employees who made, ordered, or approved the statement." Petition Appendix of U.S. ("Pet. App.") 29a. This standard recognizes that a company—as opposed to an individual—can never entirely know what information it possesses. *See New York Times Co.*, 376 U.S. at 287 ("The mere presence of the stories in the files does not, of course, establish that the Times 'knew' the advertisement was false . . . ."). By ensuring that a company will not be liable for its unintentionally erroneous statements, the specific intent requirement affords proper "breathing space" to speak. *Id.* at 271-72 ("[E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they need to survive." (internal quotation marks and alterations omitted)). Without this breathing space, a company might withhold valuable information for fear of liability, depriving the public of important perspective and information.[3]

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[3] *See* Charles H. Moellenberg, Jr. and Leon F. DeJulius, Jr., *Second Class Speakers: A Proposal to Free Protected Corporate Speech From Tort Liability*, 70 U. PITT. L. REV. 555, 586 (2009) ("That the research was funded by a corporation does not make the results of good, well-reasoned research less

While the panel below recited the proper specific intent standard, the government never attempted to satisfy it. Indeed, the government stated that it would not offer proof that any "particular representative [of Defendants] knew or believed [a] statement to be false" because such proof was "immaterial." R.J. Reynolds Pet. at 23. Instead, the government proceeded under a novel "collective intent" theory approved by the district court, asserting that its "proof will rest on the collective knowledge of the defendants' corporations' . . . representatives," which can be "imputed to the corporation-principal." *Id.* The Court of Appeals questioned the government's "dubious . . . 'collective intent' theory," but nevertheless inferred individual officers' intent through a strained interpretation of the evidence. *Philip Morris*, 566 F.3d at 1122. Such inferences do not suffice. The "specific corporate employee must be found to have the [fraudulent] intent," *Dana Corp. v. Blue Cross & Blue Shield Mut. of N. Ohio*, 900 F.2d 882, 886 n.2 (6th Cir. 1990), but the district court never found a single person to have knowingly uttered a falsehood. *See* R.J. Reynolds Pet. at 23.

The government also failed to prove that any statements were "important to a reasonable person purchasing cigarettes." Pet. App. 39a. The materiality requirement flows from the government's

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valuable. A cure for cancer and the research underlying it would be just as beneficial to mankind if developed by a corporation . . . rather than a government or government-sponsored research.").

particular interest in protecting the integrity of transactions, and ensures that liability only attaches to speech that actually affects a consumer's decision Untethered from this legitimate government interest, the government or private parties might use fraud statutes to burden and disadvantage corporate speech and enhance their own. The First Amendment guards against this because, as the United States has explained, potential liability "based on no more than a threshold showing of materiality . . . unacceptably chills speech, particularly unpopular speech that is likely to become the target of such lawsuits." U.S. *Nike* Brief at 23, 25.

In this case, there was "not a scintilla of evidence or any district court finding that any of the challenged statements (excluding 'lights') were 'important to a reasonable person purchasing cigarettes.'" R.J. Reynolds Pet. at 18. The Court of Appeals, lacking proof of materiality, was forced to speculate and dubiously conclude that "[t]he fact that Defendants continually denied any link between smoking and cancer suggests they themselves considered the matter material." Pet. App. 39a (citation omitted). But if courts can so easily infer materiality, the government's burden to prove fraud is substantially, and unconstitutionally, lightened. This relaxed materiality requirement may cause speakers to limit their public statements for fear that a plaintiff, prosecutor, or court will one day conclude a statement was material simply because it was made.

II. REVIEW IS WARRANTED BECAUSE THE D.C. CIRCUIT FAILED TO ENSURE MEANINGFUL REVIEW OF FACTS WITH CONSTITUTIONAL SIGNIFICANCE

In the district court, Petitioners repeatedly asserted that the First Amendment barred the government's efforts to impose RICO liability based on their public statements over the past six decades. The district court summarily dismissed all such assertions, finding that Petitioners' statements constituted fraud and that the First Amendment provides no protection for fraud. Slip Op. 886-889. Citing Fed. R. Civ. P. 52(a), the appeals court applied a highly deferential review standard to the district court's "fraud" findings and concluded that those findings should be affirmed because they were not "clearly erroneous." Pet. App. 12a, 46a, 49a, 61a, 64a. Accordingly, the appeals court rejected Petitioners' First Amendment claims because, it asserted, "it is well settled that the First Amendment does not protect fraud." *Id.* at 40a.

Review is warranted to determine whether the "clearly erroneous" standard applies to appellate review of findings that challenged speech falls into a category that is not entitled to First Amendment protection. As Petitioners point out, the appeals court's decision to apply the "clearly erroneous" standard directly conflicts with decisions from the Fifth, Tenth, and Eleventh Circuits. Philip Morris USA Pet. at 16, 19; Lorillard Pet. at 29. The conflict between the D.C. Circuit decisions and decisions of this Court, particularly *Bose Corp. v. Consumers Union of the U.S., Inc.*, 466 U.S. 485 (1984), provides

yet another reason this case warrants certiorari. *Bose* held that "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" 466 U.S. at 499 (quoting *New York. Times Co.*, 376 U.S. at 284-86). The Court held that that obligation "is equally applicable" both on review of state court judgments (to which Rule 52(a) does not apply) and on review of federal court judgments (to which Rule 52(a) does apply). *Id.*

Following *Bose*, this Court and other federal courts have struggled to determine what, if any, deference should be accorded to a district court's findings that relate to the adjudication of First Amendment claims. For example, in 1989 the Court fully affirmed *Bose* but at the same time acknowledged that a trier of fact's "credibility determinations" regarding witnesses in First Amendment cases should be "reviewed under the clearly-erroneous standard because the trier of fact has had the 'opportunity to observe the demeanor of the witnesses.'" *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) (quoting *Bose*, 466 U.S. at 499-500). But there is a clear conflict between *Bose* and the D.C. Circuit's categorical refusal here to conduct an independent review of the district court's finding that Petitioners' speech was fraudulent and thus entitled to no First Amendment protection. Review is particularly warranted where, as here, the result of such a categorical refusal is to deprive litigants of any meaningful appellate review of their First Amendment claims. There is serious doubt whether

such a rule meets an appellate court's obligation to ensure that "the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times*, 376 U.S. at 286.

Although the D.C. Circuit simply ignored Petitioners' *Bose*-related arguments, the propriety of independent appellate review of key factual findings in First Amendment cases is well established. *Bose* explained that such review is constitutionally mandated and has long-standing antecedents in the common law:

> The requirement of independent appellate review reiterated in *New York Times v. Sullivan* is a rule of federal constitutional law. It emerged from the exigency of deciding concrete cases; it is law in its purest form under our common-law heritage. It reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution.

Bose, 466 U.S. at 510-11.

The precise contours of the intersection between the requirement of independent appellate review and Rule 52(a)'s requirement that "findings of fact . . . must not be set aside unless clearly erroneous" have not yet been firmly established. But *Bose* was quite clear that there is one area in which the requirement

of independent appellate review should take precedence: review of "special facts that have been deemed to have constitutional significance." *Id.* at 505. After describing several categories of speech that traditionally have been deemed to merit no First Amendment protection (including fighting words, incitement to riot, obscenity, and child pornography), the Court explained the importance of careful appellate scrutiny of any assertion that challenged speech falls into one of those categories:

> In each of these areas, the limits of the unprotected category, as well as the unprotected character of particular communications, have been determined by the judicial evaluation of special facts that have been deemed to have constitutional significance. In such cases, the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited. Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by

> triers of fact may inhibit the expression of protected ideas.

Id. at 504-05.

The D.C. Circuit explicitly recognized that the district court had held that Petitioners' speech fell into a category (fraudulent speech) that it deemed unprotected by the First Amendment. Pet. App. 40a. Despite that recognition, the appeals court held that all of the factual findings that supported the "fraud" determination were subject to review under Rule 52(a)'s "clearly erroneous" standard. Review is warranted because the appeals court's holding so very directly conflicts with the *Bose* holding described above.

Even in the context of commercial speech, the Court has looked to independent appellate review as an important safeguard against an unwarranted holding that the challenged speech merits no constitutional protection. *See Madigan*, 538 U.S. at 620-21 (reviewing a challenge to Illinois's efforts to regulate commercial—and allegedly fraudulent—solicitations and stating that Illinois's assertions that the defendant's speech was constitutionally unprotected because it was fraudulent would be subject to "[e]xacting proof requirement" at trial, and that "[a]s an additional safeguard responsive to First Amendment concerns, an appellate court could independently review the trial court's findings"). Given that most of the speech at issue in this case is noncommercial in nature and that noncommercial speech is entitled to significantly greater First Amendment protection than is commercial speech,

the appeals court's adoption of a "clearly erroneous" standard of review cannot be squared with *Madigan*'s endorsement of independent appellate review of findings that speech is constitutionally unprotected because it is fraudulent.

The Court on several occasions has ruled that whether a libel defendant has acted with "actual malice" is a "special fact" that is deemed to have "constitutional significance"—and thus is subject to independent appellate review. *See, e.g., Harte-Hanks*, 491 U.S. at 685-86; *Bose*, 466 U.S. at 510-11. Similarly, whether a defendant's activities should be deemed noncommunicative in nature—and thus outside the ambit of the First Amendment—is a special fact subject to independent appellate review. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 567 (1995). And whether a defendant's speeches to civil rights supporters in Mississippi constitute "fighting words"—a category of speech to which the First Amendment does not apply—is also a special fact subject to independent appellate review. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927-28 (1982).

Even the dissenters in *Bose* were willing to accord a constitutional right to independent appellate review to "special facts" of constitutional significance "where 'a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.'" *Bose*, 466 U.S. at 517 (Rehnquist, J., dissenting) (quoting *Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927)). But the dissenters

viewed "actual malice" as a "pure historical fact[]," requiring "a determination as to the actual subjective state of mind of a particular person at a particular time," and thus subject to a "clearly erroneous" standard of review under Rule 52(a). *Id.* at 517 & n.1. The dissenters contrasted their view of "actual malice" in libel cases with factual findings regarding whether speech should be denied First Amendment protection because it qualifies as obscenity or fighting words; the dissenters argued that the latter situations "involve[d] the kind of mixed questions of fact and law which call for de novo review," because "appellate courts perhaps are just as competent as are triers of fact to make determinations about whether materials appeal to prurient interests" (obscenity) or "whether words are likely to provoke the average person to retaliation" (fighting words). *Id.*

Amici submit that the questions a trial court must answer to determine whether speech is fraudulent (thereby depriving it of First Amendment protection) would be deemed even by the *Bose* dissenters to be subject to independent appellate review as mixed questions of law and fact. For example, a fraud plaintiff must demonstrate, among other things, that any purported fraudulent statements were "material," *Neder v. United States*, 527 U.S. 1, 25 (1999), that is, of importance to a reasonable person in making a decision about a particular matter or transaction. *United States v. Winstead*, 74 F.3d 1313, 1320 (D.C. Cir. 1996). Of course, the "reasonable person" does not actually exist; he is an imaginary person hypothesized by courts to assist in determining whether the

defendant's allegedly false statements had any real world significance, and how he would react is not an "historical fact." Because appellate courts are just as competent as triers of fact to determine how a hypothetical reasonable person would react to Petitioners' allegedly false statements, both the *Bose* majority and dissenters would agree—in conflict with the D.C. Circuit—that the district court's "fraud" determination is subject to independent appellate review. *See* A. Hoffman, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts*, 50 DUKE L. J. 1427, 1456-58 (2001).

The Court has reserved a small role for Rule 52(a)'s "clearly erroneous" standard of review in cases involving "special facts" of constitutional significance. Where "the trier of fact has had the opportunity to observe the demeanor of the witness" and uses those observations to makes credibility determinations, appellate courts are to review those determinations under a "clearly erroneous" standard of review, even when the determinations qualify as "special facts." *Harte-Hanks*, 491 U.S. at 688 (internal quotation marks omitted); *Hurley*, 515 U.S. at 567. But credibility determinations could not have played a role in the district court's determination that Petitioners' speech was fraudulent, because the vast majority of the evidence before the district court consisted of documents. In sum, review is warranted because there is an irreconcilable conflict between the decisions of this Court and the D.C. Circuit's failure to accord independent appellate review to the district court's determination that Petitioners' speech was

fraudulent and thus not entitled to constitutional protection.

III. THIS CASE PRESENTS AN OPPORTUNITY FOR THE COURT TO ANSWER THE QUESTIONS IT SOUGHT TO ADDRESS IN *NIKE V. KASKY*.

A. The Time is Right for this Court to Provide Needed Guidance and Ward off Threats to Public Discourse

The First Amendment questions presented by this case are critically important. They are precisely the same issues this Court intended to address when it granted certiorari in *Nike*. *See Nike*, 539 U.S. at 657 (granting certiorari on the question of "whether a corporation participating in a public debate may be subjected to liability for factual inaccuracies on the theory that its statements are 'commercial speech'") (internal quotation marks omitted); *accord* U.S. *Nike* Brief at 1 (noting the case's "important questions respecting the relationship between the First Amendment and laws that prohibit commercial entities from making false statements in the marketplace respecting products and services").

This Court has recently reaffirmed that the speech of corporate actors may be entitled to full First Amendment Protection. *Citizens United*, 130 S. Ct. 876. Like political speech, speech on matters of public concern is "'indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.'" *Id.* at 904 (quoting *First Nat'l Bank of*

Boston v. Bellotti, 435 U.S. 765, 777 (1978)). This Court should reaffirm that corporations are vital participants in debates over matters of public concern. The government cannot eliminate the traditional accommodations between fraud statutes and the First Amendment simply because corporations are economically motivated.

Indeed, as the United States has cautioned, fraud statutes' "constraining features . . . have traditionally served to prevent any conflicts from arising between the First Amendment and laws that prohibit fraud and regulate false advertising." U.S. *Nike* Brief at 20. But a "novel legal regime" which abandons the "traditional safeguards" like scienter, injury-in-fact, reliance, and materiality, "can chill protected speech." *Id.* at 6, 20. These safeguards "ensure that lawsuits, and the threat thereof, properly reflect society's strong interests in ensuring the integrity of transactions and compensating those suffering actual injury—not the plaintiff's desire to squelch an expression or viewpoint with which he happens to disagree." *Id.* at 13.

The Court should not wait any longer to address these important First Amendment issues. The threat to speech is real and "delay itself may inhibit the exercise of constitutionally protected rights of free speech without making the issue significantly easier to decide later on." *Nike*, 539 U.S. at 667 (Breyer, J., dissenting). The same equities and values that warranted certiorari seven years ago in *Nike* obtain here today, perhaps with greater import. Here, the *government* has taken a position in the lengthy and contentious public debate over the health effects of

smoking, and subsequently sought to hold the losing side of that debate responsible for unprecedented liability under the federal fraud statutes, predicated on its participation in the very debates that the government has resolved against it. The message this sends is troubling and reinforces the importance of granting certiorari in this case.

B. If Allowed to Stand, this Case Will Chill Robust Debate on Important Matters of Public Concern

By blessing the government's novel approach, the Court of Appeals endorsed a boundless interpretation of the federal fraud statutes and a cramped view of the First Amendment that will chill public debate. Speakers who are economically motivated may self-censor for fear of ending up on the losing and disfavored end of some eventual "consensus." This will harm the quantity and quality of public debate.

This threat to public debate is not conjectural. A free press, one that serves the public welfare by "disseminat[ing] information from diverse and antagonistic sources," *Associated Press v. United States*, 326 U.S. 1, 20 (1945), cannot properly operate without access to corporate information. Journalists have previously indicated that, without access to the opinions, research, views, and information of companies or associations with an economic interest in matters of public debate—about product safety, the environmental and economic impact of an industry or proposed regulations—they cannot fulfill their mission. Indeed, unable to secure information

from sources chilled by the threat of liability, journalists have told this Court that they may be forced to write either "incomplete" and "untrustworthy" stories, or no story at all, as anything created may be too "one-sided" to be publishable. *See* Brief for Thirty-Two Leading Newspapers, Magazines, Broadcasters, and Media-Related Professional Associations as *Amicus Curiae* Supporting Petition for a Writ of Certiorari at 5, *Nike*, 539 U.S. 654.

Curtailing corporate speech thus amplifies one voice in a public debate over others, distorting the marketplace of ideas and leaving corporate actors unable to respond to public attack. Silencing companies faced with a barrage of public criticism "licens[es] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V. v. St. Paul*, 505 U.S. 377, 392 (1992). Thus, "the commercial speaker engaging in public debate suffers a handicap that noncommercial opponents do not." *Nike*, 539 U.S. at 680 (Breyer, J., dissenting).[4] But matters of public concern need more voices, not fewer. "However pernicious an opinion may seem, we depend for its

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[4] Worse still, corporate speakers may have their speech subjugated to the speech of those with just as much of an economic motive. For example, product liability attorneys, some of whom incite unwarranted fears about product safety and efficacy, could attack without fear of response. *See* Brief for Product Liability Advisory Council, Inc. as *Amicus Curiae* Supporting Petitioners at 18, *Nike*, 539 U.S. 654 (detailing the numerous examples of product safety claims that were pushed forward in the media by the plaintiffs' bar and ultimately proven meritless).

correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974).

The decision below does harm not only to the speakers involved in the present case, but to speakers on any number of important matters of public concern. Those currently engaged in, for example, the heated debates over global warming—the fact of its existence, the nature of its causes, the accuracy of its science, and the appropriate remedies for it—must be free to voice their opinions. Amici submit that the passing of time and any resulting "scientific consensus" should render neither the solar company nor the oil company liable for the opinions it voices today. But the possibility of such liability is not far-fetched. Lawsuits against power and energy companies allegedly responsible for global warming are proceeding in federal courts around the country. *See, e.g., Connecticut v. American Elec. Power Co., Inc.*, 582 F.3d 309 (2d Cir. 2009); *Comer v. Murphy Oil Inc.*, 585 F.3d 855 (5th Cir. 2009), *reh'g en banc granted*, 2010 WL 685796 (5th Cir. 2010); *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F.Supp.2d 863 (N.D. Cal. 2009), appeal docketed, No. 09-17490 (9th Cir.). Given that the science behind the global warming movement has been called into serious question recently, *see Climate Emails Stoke Debate*, Wall St. J. (Nov. 23, 2009), lawsuits against the organizations and individuals behind this movement—who themselves often have a profit motive—are not far behind.

Likewise, those who publicly debate the medical necessity or health and safety effects of abortion are

at risk. Neither side is free from attacks related to their speech. Planned Parenthood has faced charges that its websites misled the public about the health effects of abortions, *see Bernardo v. Planned Parenthood Fed'n of America*, 115 Cal. App. 4th 322 (2004). At the same time, crisis pregnancy centers face the prospect of government regulation of their speech. *See, e.g.*, Press Release, *Montgomery County Maryland County Council, Councilmember Trachtenberg Introduces Resolution Requiring 'Pregnancy Centers' To Disclose Actual Scope of Their Services*, Nov. 10, 2009 (available at http://www.montgomerycountymd.gov/Apps/Council/PressRelease/PR_details.asp?PrID=6024) (describing Councilmembers' view that crisis pregnancy centers "often provide false and misleading information to women. . . . CPCs often tell clients that abortions make future pregnancy impossible; that abortions and oral contraceptives cause breast cancer; and that condoms are ineffective in preventing pregnancy and STDs."). If one side can someday claim a "scientific consensus," it might use that consensus to silence or punish those who have advocated differently, particularly if the other side's speech was economically motivated and thus not entitled to full protection.

One need not endorse the tobacco industry's past statements to recognize that a government-endorsed scientific or other "consensus" in the hands of a civil litigant as in *Nike*, or the government's RICO enforcer here, can be a powerful cudgel. That the government may disagree with the statements of corporate speakers does not justify diminished protections for the speech at issue. *See* Martin H.

Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 264 (1998) ("One can never be sure whether restrictions on corporate expression are in reality nothing more than governmental attempts to curb or intimidate a potential rival for societal authority."). The Framers long ago decided that "it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits." *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 717-18 (1931) (quoting Report on the Virginia Resolutions, Madison's Works, vol. iv, 544).

CONCLUSION

For the reasons set forth herein and in the Petitions, the Court should grant the writ of certiorari.

Respectfully submitted,

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